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Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

PATRICK J. BRENNAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals violated the Due Process Clause by approving the trial court's refusal to review the size of the punitive damage award.

2. Whether the court of appeals' failure to conduct any appellate review of the size of the punitive damage award violates the Due Process Clause.

3. Whether the $4.125 million punitive damage award is grossly excessive in violation of the Due Process Clause.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

The caption of the case contains the names of all of the parties in the court below. Pursuant to Rule 29.6 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.

Arabian Fiberglas Insulation Company

Asahi Fiber Glass Company, Ltd.

Fiberglas Colombia, S.A.

Polyplaster, S.A.

Scandinavian Glasfiber AB

Vitro-Fibras, S.A.

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PATRICK J. BRENNAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App., *infra*, 1a-2a) is not reported, but the judgment is noted at 61 F.2d 910 (Table). The opinion of the District Court of Guam, Appellate Division (App., *infra*, 3a-29a) is not reported. The decision and order

of the Superior Court of Guam (App., *infra*, 30a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1995. A timely petition for rehearing was denied on August 24, 1995. App., *infra*, 40a-41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1 (second sentence).

In pertinent part, 48 U.S.C. § 1421b(u) provides:

> "The following . . . amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not previously been extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the first to ninth amendments inclu-

sive . . . [and] the second sentence of section 1 of the fourteenth amendment."

STATEMENT OF THE CASE

I. Factual Background

Since its formation in 1938, OCF has engaged primarily in the manufacture of various fiberglass products. Beginning in 1953, OCF distributed a unique, asbestos-containing insulation material known as Kaylo. From 1958 until 1972, OCF also manufactured Kaylo. In 1972, OCF ceased production of asbestos-containing Kaylo. OCF C.A. Br. 2.

Kaylo contained less asbestos than other contemporary asbestos insulations. Normal handling and use of Kaylo resulted in much less airborne dust than other asbestos-containing products. Tests conducted during the 1960s indicated that Kaylo could be manufactured, cut, and used without exceeding the asbestos exposure levels then thought to be safe by government and industry. OCF C.A. Br. 2, 31; OCF C.A. Reply Br. 13-14.

In recent years, OCF has been sued by hundreds of thousands of persons claiming to have been injured by exposure to Kaylo. As of March 31, 1993, OCF had already resolved approximately 107,800 asbestos personal-injury claims and had taken a cumulative charge of $943 million against earnings to account for the estimated future *uninsured* costs of asbestos claims through 1999. As of February 1994, 38 juries had imposed some $77 million in punitive damage awards on OCF in asbestos cases. OCF C.A. Br. 24-27 & nn. 26-27.

Respondent was a former pipe insulator who worked on several different job sites with various asbestos-containing insulation products, including Kaylo. Thereafter, respondent was diagnosed as suffering from malignant mesothelioma and asbestosis, both asbestos-related diseases. App., *infra*, 31a; OCF C.A. Br. 2-3.

II. Proceedings in the Trial Court

Respondent brought suit against OCF and other former manufacturers of asbestos-containing products in the Superior Court of Guam pursuant to Guam Civ. Proc. Code § 82 and 48 U.S.C. § 1424-1. The case was tried to a jury.

During the punitive damage phase of the trial, OCF introduced extensive evidence demonstrating that Kaylo could be manufactured and used in compliance with the Threshold Limit Value ("TLV") that was applicable to asbestos-containing products at the time respondent was working as a pipe insulator. The TLV was an asbestos exposure limit recommended by the American Conference of Governmental Industrial Hygienists and adopted by various jurisdictions, including New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located). *See* OCF C.A. Br. 31; OCF C.A. Reply Br. 13-14.

The jury returned verdicts in favor of respondent, awarding $2.5 million in compensatory damages and $4.125 million in punitive damages against OCF. App., *infra*, 31a. OCF filed timely post-trial motions for judgment notwithstanding the verdict, a new trial, or a remittitur, raising several grounds of error. In particular, OCF asserted that the punitive damages

award was unconstitutionally excessive and was imposed in violation of the procedural and substantive safeguards required by the Due Process Clause. App., *infra*, 31a; CR 2022 at 48, 54-59, 65.[1]

On November 4, 1992, the trial court issued a written opinion denying OCF's challenges to the punitive damage award. App., *infra*, 30a-39a. Focusing almost solely on *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and on the jury instructions regarding punitive damages, the trial court concluded that the procedures utilized at trial satisfied constitutional requirements. App., *infra*, 32a-38a. The court did not, however, address OCF's contention that the punitive award was excessive under the Due Process Clause. Instead, the court concluded that because "the punitive award procedures utilized in this case provided sufficient protection of the defendants interest and since the jury's discretion was exercised within reasonable constraints, due process is satisfied." *Id.* at 39a.

III. Proceedings in the Appellate Division

OCF appealed to the Appellate Division of the District Court of Guam pursuant to Guam Code of Civil Procedure §§ 62-63 and 48 U.S.C. § 1424-3(a). OCF claimed, *inter alia*, that the $4.125 million punitive damage award was unconstitutionally excessive in violation of the Due Process Clause. OCF App. Div. Br. 33-39, 54-66.

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[1] "CR" refers to the clerk's record or docket sheet number assigned to the cited pleading in the trial court.

On October 19, 1993, the Appellate Division issued an opinion affirming the judgment of the trial court in all respects. App., *infra*, 3a-29a. Like the trial court, however, the Appellate Division failed to conduct any independent review of the size of the punitive damage award. Instead, while recognizing that OCF had challenged the punitive damage award as unconstitutionally excessive (*id.* at 22a), the court did not conduct any meaningful review of that award, explaining that the award "*presumably* reflects the jury's and the trial court's assessment" of the evidence. *Id.* at 28a (emphasis added).

IV. Proceedings in the Court of Appeals

OCF appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291, 28 U.S.C. § 1294(4), and 48 U.S.C. § 1424-3(c). OCF contended, *inter alia*, that (1) the award of punitive damages is unconstitutionally excessive in violation of the substantive provisions of the Due Process Clause, and (2) the lower courts denied OCF its procedural due process rights by failing to conduct the requisite review of the size of the punitive damage award. OCF C.A. Br. 15-31.

On July 11, 1995, a divided panel of the court of appeals affirmed. App., *infra*, 1a-2a. The majority's entire discussion of the punitive damages issue is as follows:

> Finally, the trial court did not err in affirming the punitive damages award. The court conducted the review necessary to satisfy the requirements of due process.

App., *infra*, 2a. Circuit Judge Kozinski dissented. *Id.* at 2a.

OCF filed a petition for rehearing and suggestion of rehearing in banc. On August 24, 1995, the panel denied the petition by a divided vote. App., *infra*, 40a-41a.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Approving The Trial Court's Failure To Review The Size Of The Punitive Damages Award Is Squarely Contrary To This Court's Decision In *Honda Motor Co. v. Oberg*

In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 (1994), this Court unambiguously held that the "denial of judicial review of the size of punitive damage awards violates the Due Process Clause." As the *Honda* Court explained, "[j]udicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," and the need for such review has only increased in recent years as "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." *Id.* at 2335, 2340.

In this case, despite its recognition (App., *infra*, 31a) that OCF had properly challenged the size of the punitive damage award, the trial court failed to set forth any reasons at all for upholding the size of that award. Moreover, the court's order denying OCF's post-trial motions reveals that the court conducted no independent review whatsoever of the amount of punitive damages awarded by the jury. Rather, after determining

that the jury instructions provided sufficient guidance to satisfy the dictates of due process, the court concluded: "*since the jury's discretion was exercised within reasonable constraints, due process is satisfied.*" App., *infra*, 39a (emphasis added).[2]

Thus, it is evident that the trial court based its ruling on the assumption that jury instructions alone can satisfy the requirements of the Due Process Clause without any need for independent judicial review of the size of a punitive damage award. That assumption, however, is squarely inconsistent with this Court's decision in *Honda*, which expressly rejected that very argument: "Respondent's final safeguard, proper jury instruction, is a well-established and, of course, important check against excessive awards. *The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict.*" 114 S. Ct. at 2341 (emphasis added). In addition to proper jury instruction, therefore, judicial review is constitutionally

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[2] Similarly, as noted above (*supra* p. 6), the Appellate Division failed to conduct any review of the size of the punitive award. Moreover, the Appellate Division improperly deferred to the trial court on the question of the appropriate scope of judicial review, apparently because of its belief that it lacked the power to provide guidance to the trial court on that issue. *Id.* at 24a n.9 ("We cannot direct the Guam courts to undertake a specific type of review of punitive damages awards."). That belief was erroneous. Federal courts reviewing Guam decisions act in effect as state appellate courts (*see, e.g., Guam v. Yang*, 850 F.2d 507, 509-11 & n.4 (9th Cir. 1988) (en banc)), and in any event federal courts are authorized -- and obligated -- to enforce the Due Process Clause.

required as a further safeguard against arbitrary and excessive punitive damage awards. *Id.* at 2341-42.

Despite the trial court's clear violation of the standards enunciated in *Honda*, the Ninth Circuit rejected OCF's request (OCF C.A. Br. 17-18) to remand the case in order to permit the trial court to conduct the requisite judicial review of the size of the punitive damage award. Without so much as citing this Court's decision in *Honda*, the court of appeals simply concluded that the trial court "conducted the review necessary to satisfy the requirements of due process," App., *infra*, 2a, even though that review was limited to a consideration of the *procedures* followed by the jury and did not extend to reviewing the *size* of the award.

Thus, the Ninth Circuit clearly violated the express reasoning and holding of this Court's decision in *Honda* by approving the trial court's failure to review the size of the punitive damage award. That error is unquestionably an important one, as it involves the very issue that was deemed sufficiently substantial to merit this Court's attention in *Honda*. Under these circumstances, certiorari is warranted to correct the court of appeals' clear disregard of an opinion of this Court. *See* Sup. Ct. R. 10(a) and (c) (certiorari appropriate where "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" or "has decided an important federal question in a way that conflicts with

relevant decisions of this Court").[3] Moreover, because the decision below is directly inconsistent with *Honda*, the judgment of the court of appeals should be summarily reversed and the case remanded in order to permit the trial court to conduct the requisite review of the punitive damage award.[4]

II. The Court Of Appeals' Failure To Conduct Any Appellate Review Of The Size Of The Punitive Damage Award Conflicts With Decisions Of Numerous Other Appellate Courts And Violates Due Process

In *Honda*, this Court specifically noted the importance of appellate review of punitive damage awards, observing that "[t]he most exhaustive study of punitive damages establishes that over half of punitive damage awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages." 114 S. Ct. at 2341 n.11. Similarly, in

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[3] Moreover, the court of appeals' decision conflicts with the decisions of numerous lower federal and state courts requiring adequate and meaningful trial court review of the size of punitive damage awards. *See, e.g., Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404, 1421 (6th Cir. 1995); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1464 (11th Cir. 1991); *Sprague v. Walter*, 656 A.2d 890, 928 (Pa. App. 1995); *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908-09 (W. Va. 1991). Accordingly, the decision below would be worthy of review even if it were not directly inconsistent with this Court's decision in *Honda*.

[4] In the alternative, the Court should grant review to give plenary consideration to this question and resolve the conflict among the lower courts. *See supra* note 3.

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), this Court emphasized that appropriate "appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 499 U.S. at 21.

Not surprisingly, therefore, numerous state and federal appellate courts have held that the Due Process Clause requires meaningful and adequate appellate review of the size of punitive damage awards. Thus, in *Ezzone v. Riccardi*, 525 N.W.2d 388, 399 (Iowa 1994), *cert. denied*, 115 S. Ct. 1958 (1995), for example, the Iowa Supreme Court held that it was "obliged as a matter of constitutional law to assume responsibility for reviewing the appropriateness of the size of punitive damage awards" and that "it is a denial of due process for a state to allow punitive damages without according *appellate* review of the appropriateness of the amount." 525 N.W.2d at 398-99 (emphasis added).

Similarly, in *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. Ct. 1995), the court held as follows: "The United States Supreme Court has clearly indicated that the trial *and appellate* courts of the various states must provide meaningful review of the amount of punitive damages awarded by a jury in any given case." *Id.* at 928 (emphasis added). Numerous other decisions are to the same effect. *See, e.g., Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1477 (10th Cir. 1995) ("The final procedural due process safeguard is our [*i.e.*, the appellate court's] substantive review of the amount of the punitive damages award."); *Garnes v. Fleming Landfill, Inc.*, 413

S.E.2d 897, 908 (W. Va. 1991) ("Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia," including "a meaningful and adequate appellate review").

In this case, by contrast, despite OCF's explicit claim that the punitive damages award was unconstitutionally excessive (OCF C.A. Br. 18-31), neither of the appellate courts hearing OCF's appeals conducted *any* substantive review of the size or propriety of that award. Instead, the two appellate courts abdicated their responsibility by giving absolute deference to the *trial* court. The Appellate Division relied on its assumption that the punitive award "*presumably* reflects the jury's and the trial court's assessment" of the evidence, App., *infra*, 28a (emphasis added), and the court of appeals merely concluded (erroneously, as explained above) that the trial court "conducted the review necessary to satisfy the requirements of due process." App., *infra*, 2a.

The failure of the two appellate courts to conduct an independent substantive review of the size of the punitive award amounts to a separate constitutional violation under the reasoning of the cases cited above, because those cases make clear that trial court review alone is insufficient to satisfy the dictates of the Due Process Clause. Thus, the decision below creates an irreconcilable conflict among the lower federal and state appellate courts, and this Court's plenary review is warranted to resolve the conflict. *See* Sup. Ct. R. 10(a).

III. The $4.125 Million Award of Punitive Damages Is Grossly Excessive In Violation Of The Due Process Clause And The Factors Presented In The *BMW* Case

A. This Court Has Already Granted Certiorari To Address The Question Presented Here

As this Court recognized in *Honda*, "the Constitution imposes a substantive limit on the size of punitive damage awards." 114 S. Ct. at 2335. In *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this Court granted certiorari to decide, *inter alia*, what standards are to be applied in determining whether a punitive damage award is unconstitutionally excessive. *See* Pet. for Cert. in No. 94-896 ("*BMW* Pet.") at I (raising question whether the challenged punitive award "is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment"). BMW's petition for a writ of certiorari pointed to various factors that demonstrate the excessiveness of the award in that case. *See BMW* Pet. 18-25.

In this case, of course, OCF has consistently argued that the punitive damage award violates the substantive component of the Due Process Clause. *See supra* pp. 4-6. Moreover, many of the precise factors that demonstrate the excessiveness of the award in *BMW* are also present here, making this case a particularly strong candidate for review. For example, BMW argues that "adherence to industry custom . . . constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one of enormous size." *BMW* Pet.

Br. 40-41; *see BMW* Pet. 18-19. In this case, OCF likewise argued vigorously below that its "compliance with the applicable . . . industry standards negates any basis for the imposition of punitive damages in this case, and renders the punitive award plainly excessive." OCF C.A. Br. 31; *see also* OCF C.A. Reply Br. 13-14.

Similarly, BMW argues in its brief on the merits that its compliance with statutory disclosure standards adopted in numerous States eliminates any justification for a large award of punitive damages. *BMW* Pet. Br. 37-40 & n.23. By the same token, OCF has consistently taken the position that "[p]unitive damages do not serve a legitimate deterrent or retributive function where, as here, the defendant is being punished for conduct that complied with applicable government . . . safety standards." OCF C.A. Br. 31.

In addition, BMW argues at length that the punitive award imposed on it is unconstitutionally excessive in part because that case involves a "mass tort" and therefore creates the potential for multiple punitive awards arising out of the same course of conduct. *BMW* Pet. Br. 45-50. As BMW asserts, "[t]he question to be asked is: if every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?" *Id.* at 46; *see also BMW* Pet. 21.

Once again, precisely the same factor is present in this case. OCF has consistently argued that the excessiveness of the punitive damage award imposed in this case is demonstrated by the existence of, and potential for, numerous other claims of injury and punitive

awards arising out of the same course of conduct, *i.e.*, OCF's manufacture and distribution of asbestos-containing Kaylo. *See* OCF C.A. Br. 18-20, 23-28; OCF C.A. Reply Br. 7-12. Just as in *BMW*, moreover, the award at issue in this case would plainly be excessive "if every other plaintiff recovered the same amount of punitive damages" (*BMW* Pet. Br. 46). Indeed, if the punitive damage award imposed in this case against OCF were imposed just in the other asbestos cases brought against OCF in the Superior Court of Guam, OCF would be exposed to well over $1 billion in punitive damages in Guam alone.

In short, this case raises the same question as that presented in *BMW*, and it does so in a very similar legal and factual setting. Given the obvious and substantial similarities between the two cases, it is readily apparent that a favorable decision in *BMW* would have a direct and substantial impact on the outcome of this case. Accordingly, if this petition is not otherwise granted, it should be held pending this Court's decision in *BMW* and then disposed of in light of the disposition of that case.[5]

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[5] OCF notes that this Court recently granted a stay pending the filing and disposition of a writ of certiorari in *Owens-Corning Fiberglas Corp. v. Rekdahl*, No. A-241 (Sept. 29, 1995). The issue raised in the stay application in that case is virtually indistinguishable from that presented here, and the Court's decision to grant the stay therefore supports OCF's contention that, at the very least, this petition should be held for *BMW*.

B. The Lower State And Federal Courts Are Divided Over The Standards To Be Applied In Reviewing Punitive Damages Awards

The *BMW* petition argues persuasively that, despite this Court's prior decisions in this area,[6] punitive damage awards continue to skyrocket and the lower state and federal courts continue to apply inconsistent standards and reach conflicting results in reviewing the size of punitive damage verdicts. *BMW* Pet. 26-29. Thus, the *BMW* petition demonstrates that the lower federal and state courts are in substantial need of additional guidance on the proper approach to the excessiveness inquiry. This Court's decision to grant review in *BMW* establishes the importance and significance of that question. Review of that same question would therefore be warranted in this case if the Court's disposition of *BMW* were to leave that question unresolved.

Indeed, this case is a particularly strong candidate for review in that regard, because the decision below is directly inconsistent with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993), which involved an asbestos personal injury suit against OCF arising out of the same course of conduct at issue here. In *Dunn*, the court of appeals held that the district

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[6] *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

court gave "insufficient consideration to the effect of successive punitive awards in asbestos litigation" when it remitted a $25 million award against OCF to $2 million. 1 F.3d at 1391. Accordingly, the en banc court further reduced the award against OCF to $1 million, explaining that an award of that size was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added).[7]

Similarly, numerous other courts have emphasized that the existence of, or potential for, other punitive damage awards against the same defendant for the same course of conduct raises due process concerns and is an appropriate factor to be considered in determining whether a particular award is grossly excessive.[8] Although OCF argued this point at length to the

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[7] Five members of the court dissented on the ground that the Due Process Clauses bars *any* further awards of punitive damages against OCF because the amounts already awarded in prior litigation are more than necessary to achieve fully the goals of punishment and deterrence. *Id.* at 1400-05 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.); *id.* at 1405 (Becker, J., dissenting).

[8] *See, e.g.*, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (citing with approval the Alabama Supreme Court's consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires consideration of "other civil or criminal penalties levied on the defendant"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also In re School Asbestos Litig.*, 789 F.2d 996,

court of appeals (*see* OCF C.A. Br. 18-20, 23-28), that court (unlike the Third Circuit in *Dunn v. HOVIC*) was unpersuaded. Plenary review of this issue is therefore warranted if this Court's disposition of *BMW* does not itself require reconsideration of the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below summarily reversed, and the case remanded for further proceedings because of the court of appeals' failure to require the trial court to review the size of the punitive damage award. In the alternative, the petition for a writ of certiorari should be granted and the case set for plenary consideration. Finally, if the petition is not granted immediately, it

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1005 (3d Cir.), *cert. denied*, 479 U.S. 852 and *cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967) (Friendly, J.); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234, 1236 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889, 213 Cal. Rptr. 547 (1985).

should be held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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November 21, 1995

APPENDIX

APPENDIX A

Not for Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed July 11, 1995]

**********	*	
In Re: **GUAM ASBESTOS LITIGATION**	*	
**********	*	
PATRICK J. BRENNAN, Plaintiff-Appellee	*	No. 93-17163
v.	*	D.C. No. CV-92-00064-ARM
OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	*	**MEMO-RANDUM***
**********	*	

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal for the United States District Court
for the District of Guam, Appellate Division
Unpingco, Munson, and Rafeedie, Judges, Presiding

Argued and Submitted May 3, 1995
Honolulu, Hawaii

Before: **PREGERSON, KOZINSKI,** and **HAWKINS**, Circuit Judges.

The judgment of the Appellate Division is affirmed. The record shows that the trial court gave an adequate instruction on legal causation in the second phase of the trial. The trial court did not abuse its discretion in allowing Barry Castleman, who wrote a book on the subject at issue, to testify as an expert for the plaintiff. Finally, the trial court did not err in affirming the punitive damages award. The court conducted the review necessary to satisfy the requirements of due process.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

Because the trial court's instructions were defective in that they did not require the jury to find a causal link between the claimed defect and Brennan's injury, I would reverse. I would also reverse because Barry Castleman was not qualified to testify as an expert on the medical state of the art or anything else; he appears to have read a number of articles for the sole purpose of turning himself into an expert witness. Reductio ad absurdum.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
TERRITORY OF GUAM
- APPELLATE DIVISION -
[Filed October 19, 1993]

In re GUAM ASBESTOS LITIGATION	DCA No. 92-00064A
PATRICK J. BRENNAN Plaintiff-Appellee v. OWENS-CORNING FIBERGLAS CORP., Defendant-Appellant	OPINION

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Before: UNPINGCO, MUNSON*, and RAFEEDIE**

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*The Honorable Alex R. Munson, Chief Judge, U.S. District Court for the Northern Mariana Islands, sitting by designation.

**The Honorable Edward Rafeedie, District Judge, United States District Court for the Central District of California, sitting by designation.

MUNSON, Judge:

Appellee Patrick J. Brennan brought suit against appellant Owens-Corning Fiberglas Corporation (OCF) and three other defendants for asbestos-related injuries. By agreement of the parties, trial was bifurcated. At the conclusion of Phase I, defendant Foster-Wheeler moved for a directed verdict, which was granted. Between Phases I and II the other two defendants settled with plaintiff. The jury returned a verdict against appellant OCF for $2.5 million in compensatory damages and $4.125 million in punitive damages. OCF timely filed its notice of appeal and now argues several grounds for remand for a new trial and reversal of the award of punitive damages.

Issues and Analysis

1. Did the cumulative effect of certain evidentiary rulings deprive OCF of a fair trial?

Appellant OCF argues that the combined effect of several evidentiary rulings worked to deprive it of a fair trial. We shall consider each ruling in turn.

Dr. Demopoulos' Testimony

Appellant OCF asserts that the trial court erred when it prevented OCF's medical expert, Dr. Demopoulos, from testifying about the nature of appellee's medical condition and the causes of that condition.

The record shows that three days prior to the May 20, 1991, pretrial conference, and in accordance with the General Pretrial Order, appellant designated Dr. Demopoulos as an expert defense witness on matters of medical pathology. The trial court denied appellee's motion to wholly exclude the doctor's testimony on the ground that they had effectively been prevented by appellant from deposing him. However, the next day the

court ruled that Dr. Demopoulos could not testify about appellee's exposure to radiation and that OCF could not mention it, even when cross-examining Brennan about his own testimony or when questioning Brennan's two experts, who had mentioned in their depositions studies reporting a possible link between radiation and mesothelioma. Appellant argues that it was made to suffer for appellee's failure to promptly depose the doctor after he had been designated as an expert.

Appellant claims the trial court also erred when it limited Dr. Demopoulos' testimony on pathology matters to "materials that he has reviewed," thus preventing him from explaining his diagnosis that appellee suffered from adenocarcinoma and not mesothelioma. Appellant maintains that the trial court, by allowing appellee to present four experts on the causes of cancer and lung disorders and effectively preventing OCF from presenting even one, abused its discretion by permitting appellee's evidence of his medical condition to go to the jury almost unchallenged.

Appellee responds that: 1) Dr. Demopoulos was designated as an expert on pathology only, 2) the trial court did not abuse its discretion in prohibiting him from testifying about radiation exposure because he had not been designated as an expert in that area, 3) that OCF's cross-examination of appellee's experts on the issue showed that the possibility of appellee's cancer being due to his exposure on two occasions in the early 1950s to extremely low levels of atomic bomb radiation was almost nil, and 4) Dr. Demopoulos was not completely prevented from testifying about the causes of appellee's cancer. Rather, he was restricted,

in giving his opinion that appellee suffered from adenocarcinoma, to relying on whatever materials he had actually reviewed in reaching that conclusion, based on his education, experience, training and background.[1]

A trial court's evidentiary rulings are reviewed for an abuse of discretion. Mitchell v. Keith, 752 F.2d 385, 392 (9th Cir.), cert. denied, 472 U.S. 1028, 105 S.Ct. 3502, 87 L.Ed.2d 633 (1985). The trial court has broad discretion in admitting and excluding expert testimony and we will sustain the court's action unless it is manifestly erroneous. Reno-West Coast Distribution Co. v. Mead Corp., 613 F.2d 722, 726 (9th Cir.), cert. denied, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 183 (1979).

The trial judge never made clear on the record the basis for his rulings regarding Dr. Demopoulos. However, a reading of the record supports the conclusion that the trial court prohibited Dr. Demopoulos' testimony about anything other than his opinion concerning the pathology of appellee's medical condition for two reasons. First, because the court was apparently convinced that appellant had intentionally kept from Dr. Demopoulos (its own expert) some pathology slides which, as part of a pretrial agreement between the parties, had been sent by appellee for him to review. This appears to have been done so that appellee

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[1] He was allowed to "explain his conclusion with regard to what disease plaintiff suffers from, and he may explain why he does not believe that the plaintiff's expert witnesses are correct in their diagnosis." (Ph. I Tb. 1057.)

would not be able to depose him as to his conclusions about what the slides revealed. Second, Dr. Demopoulos was not allowed to testify about radiation because he had not been designated as an expert in that area and appellee had thus had no opportunity to prepare to depose him about such testimony.

It is difficult not to conclude that any harm to appellant's case was primarily self-inflicted and came about as a result of failed gamesmanship. Nevertheless, we have considered the allegations of error and cannot say that, with the facts before it, the trial court's decision to limit Dr. Demopoulos' testimony was manifestly erroneous.

Evidence of OCF's Financial Condition

Appellant argues that the "most appropriate" admissible evidence of its financial condition were statements of OCF's net income and net worth, and that evidence that was admitted of its gross sales, gross assets, gross value of all its shares of stock, and its pre-tax profits was so prejudicial and misleading as to require reversal and a new trial. Appellant relies on Adams v. Murakami, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991), to support its argument that the California Supreme Court has now expressly rejected those cases in which evidence other than net worth or net income was used and upon which the trial court here relied.[2]

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[2] Both parties indiscriminately cite Roberto v. Aguon, 519 F.2d 754 (9th Cir. 1975), for the proposition that "Guam generally borrows California law," Appellant's Brief, p.14, or that "Guam looks to California for assistance in resolving substantive questions of law,"

[Footnote continued on next page]

Appellee responds that Adams states only that record evidence of a defendant's financial condition is a prerequisite to an award of punitive damages and that plaintiff has the burden of putting on such evidence. Appellee further argues the jury was entitled to as complete a picture of defendant's financial condition as was possible in order to make an informed decision.

As noted above, we review this evidentiary ruling for an abuse of discretion, Mitchell v. Keith, 752 F.2d at 392. We find no such abuse here. Adams v. Murakami does not state that only evidence of a defendant's net worth may be presented, only that plaintiff must present some evidence of financial condition before punitive damages can be awarded. As appellee correctly notes, the Court in Adams v. Murakami expressly declined "to prescribe any rigid standard for measuring a defendant's ability to pay." Adams, 284 Cal.Rptr. at 325 n.7, 813 P.2d at 1355 n.7. There was

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[Footnote continued from previous page]

Appellee's Brief, p. 38. Neither of these statements is correct. Roberto and the cases which cite it state only that decisions of California courts which pre-date the December, 1933, enactment of the Guam territorial laws are controlling authority on issues of the statutory construction and effect of Guam laws, and California cases subsequent to the adoption of the Guam codes, while not binding, are persuasive. Id. at 755. Guam courts need defer only to pre-December, 1933, California decisions which interpret California code sections identical to, or substantially similar to, Guam Code sections. Here, however, because the trial court expressly stated that it would use California jury instructions and California law, we will do likewise. [Ph. I Tr. pp. 110-111.]

no error, particularly when defendant could have offered its own evidence regarding the corporation's financial condition and chose not to do so.

The Deposition of John Thomas

Appellant complains of the admission into evidence of the deposition of Mr. John Thomas, a former president of OCF. Appellant objected to the admission of the April, 1991, deposition on two grounds: that Thomas was not a competent witness under Title 6, Guam Code Annotated (GCA) §§ 601 - 603[3] and that he decided not to sign his deposition because he could not attest to its accuracy. As to the first ground, appellant claimed that the 83-year-old Thomas had been diagnosed by his physician as having serious memory problems and to be suffering from dementia. Appellant sought to obtain an affidavit on the issue from Thomas' personal physician or to be granted a continuance to depose him. The trial court refused to allow either.

The first (and only) sentence of 6 GCA § 601 and the entire text of § 603 are substantially identical to the correspondingly numbered Federal Rules of Evidence. We "look to relevant Ninth Circuit authority when interpreting a Guam statutory rule that closely tracks a federal procedural rule." Guam v. Ojeda, 758 F.2d

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[3] Section 601 provides: "Every person is competent to be a witness except as otherwise provided in this title." Section 603 requires that: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

403, 406 (9th Cir. 1985) (federal rules of evidence); De Vera v. Blaz, 851 F.2d 294, 296 (9th Cir. 1988)(federal rules of civil procedure).[4]

A trial court's determination of the competency of a witness will not be reversed absent an abuse of discretion. See e.g., Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982). A reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1337 (9th Cir. 1985). It is for the jury to determine the weight properly to be given the testimony. Batchelor, 693 F.2d at 865.

On July 5, 1991, OCF moved to "suppress" the Thomas deposition and submitted a 22-page memorandum in support of its motion. The trial court read the entire deposition, noted that Thomas chose not to sign his deposition after both his attorney and doctor recommended that he not sign it, and allowed its use at trial. As noted by the parties, different courts in other lawsuits against appellant have come to different conclusions on the use of Thomas' deposition. However, we cannot say that the trial court, having read Thomas'

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[4] However, if a Guam rule merely sets general standards of litigation conduct (as opposed to a challenge to the substantive sufficiency of the pleadings), we will defer to the interpretation placed upon the rule by the local court, unless the local court has purported to adopt and follow Ninth Circuit law. Lynn v. Chin Heung International, Inc., 852 F.2d 1221, 1222-23 (9th Cir. 1988).

deposition, "committed a clear error of judgment" by allowing its use here.

Dr. Castleman's Testimony

Appellant first argues that Barry Castleman was not qualified to testify as an expert concerning medical knowledge of the hazards of asbestos during the time periods relevant to this lawsuit, and that the prejudice stemming from denominating him an expert far outweighed the probative value of his testimony. Appellant further asserts that the trial court erred because the documents Castleman testified about were ordinary, everyday OCF corporate documents and internal correspondence, which "speak for themselves."

Appellee responds that Castleman's "specialized knowledge" was admissible for one reason: it assisted the jury. 6 GCA § 702.[5] Appellee notes that Castleman's expertise was not as a medical doctor but, rather, was derived from his many years of study of the asbestos industry.

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[5] Section 702, Testimony by Experts, is identical to Federal Rule of Evidence 702, and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Title 6 GCA §§ 403[6] and 702 are substantially identical to their counterparts in the Federal Rules of Evidence. As noted above, we "look to relevant Ninth Circuit authority when interpreting a Guam statutory rule that closely tracks a federal procedural rule." Guam v. Ojeda, 758 F.2d at 406; De Vera v. Blaz, 851 F.2d at 296. The trial court's evidentiary rulings are reviewed for an abuse of discretion, Mitchell, 752 F.2d at 392, and its broad discretion in admitting and excluding expert testimony will be sustained unless it is manifestly erroneous. Reno-West Coast Distribution Co. v. Mead Corp., 613 F.2d at 726. A witness can qualify as an expert through practical experience in a particular field. Rogers v. Raymark Industries, Inc., 922 F.2d 1426, 1429 (9th Cir. 1991). Here, Dr. Castleman gained his expertise by many years of studying corporate response to knowledge concerning the hazards of asbestos by collecting and categorizing documents, publications, and reports demonstrating the industry's decisions regarding information and warnings to users about the possible risks associated with asbestos products. The trial court, in an exercise of its

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[6] Section 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative issues.

discretion, determined that Castleman had sufficient specialized knowledge, skill, experience, training, or education to synthesize his research and knowledge and render an opinion which would be of assistance to the jury in its deliberations. On the record before us, we cannot say that the trial court's conclusion in this regard was "manifestly erroneous."

The Chronology Given to the Jury by Appellee's Counsel During Closing Argument

The trial court permitted appellee to distribute to the jury during his closing argument a 30-page summary of the evidence. Appellant had objected to the tactic when appellee first informed the court of his desire to give a summary to the jury but the court reserved ruling. Later, without ever explicitly ruling on the objection, the court let appellant give a copy to each juror without first examining the summary to ensure it did not contain improper material or allowing OCF to examine it. Appellant makes no specific objection except to claim that the trial court violated clear Ninth Circuit precedent and that allowing use of appellee's chronology "perverted the judicial process and contributed to the excessive verdict in this case."

Appellee responds that the court has broad discretion to allow the use of charts and summaries which might clarify testimony, that the 30-page summary contained the same information included on large charts which he had also prepared, set on an easel, and referred to during his closing argument, and that the summary was not admitted into evidence or taken into the jury room when the jury began its deliberations. Finally, appellee notes that the trial court instructed the jury that: "Charts and summaries are only as good as the under-

lying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves."

Appellant is correct that the Ninth Circuit has determined that two precautionary measures should be taken by a district court when summary charts are used. First, the court must carefully examine the summary charts, out of the presence of the jury, to determine that everything contained in them is supported by the proof. United States v. Soulard, 730 F.2d 1292, 1300 (9th Cir. 1984), citing United States v. Abbas, 504 F.2d 123, 124 (9th Cir. 1974), cert. denied, 421 U.S. 988, 95 S.Ct. 1990, 44 L.Ed.2d 477 (1975). Second, summaries may be used as testimonial aids for witnesses and visual aids for counsel during argument, but should not be admitted into evidence or used by the jury during deliberations. Id. While we endorse the Ninth Circuit procedure and recommend its adoption by the Guam courts as an added safeguard, we review here only for an abuse of discretion. Holland v. United States, 348 U.S. 121, 128, 75 S.Ct. 127, 131, 99 L.Ed. 150 (1954).

We believe it was error for the trial court to allow the use of the summary without first having reviewed it to determine that everything in it was supported by the proof. However, we find that the error was harmless in light of these facts: 1) appellant did not renew its objection when the summary was first brought out for the jury, 2) the summary given to the jury replicated the larger charts used by appellee during his closing argument, 3) the summary was not admitted into evidence or used by the jury in its deliberations, and 4)

the cautionary instruction given to the jury by the trial court ameliorated the error.

2. Was the jury improperly instructed on the issue of causation?

Appellant OCF claims it is entitled to a new trial as a matter of law because the jury was never required by the instructions to find that a defect in OCF's product, Kaylo, caused appellant's medical condition. Appellant argues that Phase I of the bifurcated trial was to establish only whether or not plaintiff suffered from an asbestos-related disease. Left to Phase II was the determination of whether there was a defect in Kaylo and if the defect in fact caused appellee's medical condition. According to OCF, appellee successfully misled the trial court at the beginning of Phase II that the jury had determined legal causation in Phase I. Appellant claims that California Bar-Approved Jury Instruction (BAJI) 3.76, "Legal Cause," was given unnecessarily in Phase I and that it confused both the court and the jury. Therefore, when the jury made its findings in Phase II it had not been instructed regarding any of the elements of strict liability, nor had it been specifically charged to determine whether any of the elements of strict liability had been proved.

Appellee counters that OCF did not object in Phase I to the giving of BAJI 3.76 or to the special verdict form, which asked the jury to determine causation. As further proof that causation was tried in Phase I, appellee cites to defendant Foster-Wheeler's motion for directed verdict, which was granted because no causal link had been shown between appellee and Foster-Wheeler's products.

The record reveals that during the jury instructions at the conclusion of Phase I the jury was instructed to determine whether "the asbestos-containing products of any of the defendants were a substantial factor in causing or contributing to plaintiff Patrick Brennan's asbestos-related disease or injury," [Ph. I Tr. 1363] The jury was further instructed that:

> A legal cause of injury, damage, loss or harm is a cause which is a substantial factor in bringing about the injury, damage, loss or harm. There may be more than one legal cause of an injury. When conduct of two or more persons contributes concurrently as legal causes of an injury, the conduct of each of said persons is a legal cause of the [in]jury, regardless of the extent to which each contributes to the injury. [Ph.I, Tr. 1368]

And, finally, that "[a] cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the conduct of a person not joined as a party, was also a legal cause of the injury." [Ph.I, Tr. 1369]

The special verdict form given to the jury at the conclusion of Phase I contained Question No. 3: "Were the asbestos-containing products of any of the following defendants a substantial factor in causing or contributing to plaintiff Patrick Brennan's asbestos-related disease or injury." The jury answered "yes" as to three defendants, including OCF.

We review jury instructions as a whole, to determine if the trial court gave instructions that were misleading or that stated the law incorrectly to the prejudice of the

objecting party and will reverse only for an abuse of discretion. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 212 (9th Cir. 1988)(emphasis added). Instructions are reviewed in the context of the case. Lewy v. Southern Pacific Transp. Co., 799 F.2d 1281, 1287 (9th Cir. 1986). The reviewing court should consider the guidance provided by the verdict form. In re Aircrash in Bali Indonesia, 871 F.2d 812 (9th Cir.), cert. denied, 493 U.S, 917, 110 S.Ct. 277, 107 L.Ed.2d 257 (1989). A party who does not object to an instruction may not complain of it. Hammer v. Gross, 932 F.2d 842, 847-848 (9th Cir. 1991)(no "plain error" exception is recognized in the Ninth Circuit); United States v. Parsons Corp., No. 90-56328, slip op. at 8484 (9th Cir. Aug. 6, 1993)(Regarding Fed.R.Civ.P. 51, "judges are more likely to correct errors if they are aware the lawyer is raising legal objections, not just quibbling about matters within the court's discretion.") The relevant portion of Guam Rule of Civil Procedure 51 provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." This language is identical to the federal rule existing at the time this case was heard. Guam v. Ojeda, supra, 758 F.2d at 406; De Vera v. Blaz, supra, 851 F.2d at 296.

Appellant failed to object to the instructions in question, thus waiving any claim of error. In any event, given the record before us, we could not accept appellant's argument that the issue of causation was not before the jury in Phase I. Accordingly, we affirm.

3. Was OCF entitled to judgment notwithstanding the verdict on the ground that plaintiff failed to prove two essential elements of his strict liability cause of action:

a. That the jury could not have rationally inferred that plaintiff's exposure to OCF Kaylo caused his medical condition; and,

b. That plaintiff presented insufficient evidence in Phase II of the trial to permit the jury to find that a defect in OCF Kaylo caused his medical condition.

Appellant OCF argues that the jury's finding in Phase I that Owens-Illinois' (OI) Kaylo was not a substantial factor in appellee's medical condition was inconsistent with its finding in Phase II that appellant's Kaylo was a factor. This is because there was no such thing as OCF Kaylo until 1958 and appellee's testimony was that he had first been exposed to asbestos-containing products in 1949. Thus, any 1949-1958 exposure had to be to OI Kaylo and not OCF Kaylo. Because latency periods for mesothelioma extend to forty or fifty years, the jury could not have rationally absolved OI of blame and concluded that OCF's Kaylo was a substantial factor in appellee's diseases.

Appellee responds that two distinct lines of thought have emerged as to the type of evidence an asbestos plaintiff must prove to show a defendant's product was the legal cause of his or her injuries. In the "Hawaii cases," In re Hawaii Federal Asbestos Cases, 960 F.2d 806, 817 (9th Cir. 1992), courts required particularized proof that a plaintiff came into contact with a defendant's products before he or she was allowed to recover from that defendant. Other courts have

recognized that plaintiffs may not be able to identify with specificity the manufacturers of products to which plaintiffs were exposed decades earlier, and these courts require only that the plaintiff show a particular manufacturer's products were present at the worksite. If the plaintiff can do so, it can be inferred that the plaintiffs exposure to the products was a substantial factor in causing the disease. Id. at 817 (collected cases). Appellee claims he met both tests.

In reviewing denial of a motion for judgment notwithstanding the verdict, we examine the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of that party. Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir. 1987). We will affirm if the jury's verdict was supported by substantial evidence; that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. at 450-451. A jury verdict may be reversed only if it is clearly erroneous. Id.

Here, the evidence at trial showed that appellant OCF advertised and distributed Kaylo insulation products manufactured by Owens-Illinois (OI) between 1953 and 1958. Appellant acquired OI in 1958 and thereafter manufactured and sold Kaylo until 1973. Appellee began working with Kaylo in 1953 and continued to use it for the duration of his working life. Appellee's asbestosis was diagnosed in 1988 and his mesothelioma in 1990. The latency period for asbestosis is ten to thirty years and six to fifty years for mesothelioma. There was substantial evidence to support the jury's conclusion that since most of appellee's exposure to asbestos dust came after 1953, and appellant's product

Kaylo was the product he used most of the time, that Kaylo was defective, and that his exposure to the defective Kaylo was a substantial factor in his injuries. There was substantial evidence to support the jury's finding; that is, there was such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.

4. Is OCF entitled to a remittitur or a new trial for both the compensatory and punitive damage awards?

Appellant argues that it is entitled to a remittitur or a new trial because the compensatory and punitive damages awards in this lawsuit are unreasonable and excessive. Specifically, appellant argues that the maximum possible amount of compensatory damages shown at trial was approximately $1 million but the jury returned a verdict for $2.5 million. We address this issue only as to compensatory damages; the award of punitive damages will be discussed in Issue 5, below.

Guam Civil Code § 3359[7], enacted in 1953, essentially mirrors the similarly-numbered California Civil Code section: damages must in all cases be reasonable. As we noted earlier, decisions of California courts which pre-date the December, 1933, enactment of the Guam territorial laws are controlling authority on is-

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[7] Guam Civil Code § 3359 provides:

> Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

sues of the statutory construction and effect of Guam laws identical to California laws, and California cases subsequent to the adoption of the Guam codes, while not binding, are persuasive Roberto v. Aguon, 519 F.2d at 575.

"A reviewing court does not ordinarily substitute its judgment for that of the jury and trial court, which have evaluated in terms of damages the pain, humiliation, disfigurement, and loss of earning capacity suffered by a plaintiff." Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645 (1947). Such reasoning, coming as it does from a post-1933 California decision, is deemed persuasive in the Guam courts. Appellant offers nothing to indicate that the jury's compensatory damages verdict does not simply reflect its acceptance of the high end of the range of objective damages proved to it at trial and its quantification of plaintiff's pain and suffering. We decline to order a remittitur.

5. Does the $4.5 million award of punitive damages violate due process?

Finally, appellant OCF argues that the $4.5 million punitive damages award violates due process[8] because

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[8]The Due Process Clause is a federal constitutional standard to be applied in the case of federal as well as state punitive damages awards. The Fifth Amendment and Fourteenth Amendment due process clauses should be applied in the same manner when two situations present identical questions differing only in that one involves a proscription against the federal government and the other a proscription against the States. For the purpose of Due Process Clause scrutiny of a punitive damages claim it makes no difference whether the damages were imposed in a federal court or a state

[Footnote continued on next page]

the jury was not adequately instructed and because the trial court failed to conduct a meaningful post-verdict review of the award for reasonableness. Appellant asserts that we must, after reviewing the award, reverse and order a new trial.

We disagree. The Supreme Court and the U.S. Court of Appeals for the Ninth Circuit have recently addressed this issue. See TXO Production Corp. v. Alliance Resources, 61 U.S.L.W. 4766, 113 S.Ct. 2711, 125 L.Ed.2d 366 (June 25, 1993); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); and, Morgan v. Woessner ("Morgan II"), 997 F.2d 1244 (9th Cir. 1993). Our reading of these cases leads us to the following conclusion: The United States Supreme Court has refused to formulate a "bright-line" test to determine whether an award of punitive damages violates due process. The Court has stated only that "a general concern of reasonableness... properly enters into the constitutional calculus." TXO Production Corp., 61 U.S.L.W. at 4770, quoting Haslip, 499 U.S. at 18, 111 S.Ct. at 1043. And, "[a]ssuming that fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity." Id. (Citation omitted.)

Below, in TXO, the West Virginia Supreme Court of Appeals had used a common law three-factor "reasonable relationship" test when assessing the award of

---

[Footnote continued from previous page]

court, on a federal claim or a state claim. See generally Morgan v. Woessner (Morgan II), supra.

punitive damages: 1) the potential harm that defendant's action could have caused, 2) the maliciousness of defendant's actions, and 3) the penalty necessary to discourage the defendant from acting similarly in the future. 187 W.Va. 457, 419 S.E.2d 870 (1992). The United States Supreme Court in TXO upheld this sort of examination, as it had done in Haslip.[9]

The Court in Haslip noted that neither it nor any federal or state court decision of which it was aware had ever found that the common-law method for assessing punitive damages violated due process. 499

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[9]We cannot direct the Guam courts to undertake a specific type of review of punitive damages awards but we note that the U.S. Supreme Court looked favorably upon what have come to be called the Hammond factors. These were outlined by the Supreme Court of Alabama in Hammond v. City of Gadsden, 493 S.E.2d 1374, 1379 (Ala. 1986), and subsequently refined by that Court in Green Oil v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989) and Central Alabama Electric Cooperative v. Tapley, 546 So.2d 371, 376-377 (Ala. 1989). These include: 1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred, 2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct, 3) the profitability to the defendant of the wrongful conduct and the desirability of removing the profit and of having the defendant also sustain a loss, 4) the "financial position" of the defendant, 5) all the costs of litigation, 6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation, and 7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

U.S. at ___, 111 S.Ct. at 1043. Under the traditional common-law approach, the amount of the punitive award is initially determined by the jury, which has been instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable. 499 U.S. at ___, 111 S.Ct. at 1042. Having approved this methodology, the Court turned to the question of whether the size of the award violated the due process clause and was thus unconstitutional.

Similarly, in Morgan II the Ninth Circuit used the three-stage review of punitive damages found by the Supreme Court in Haslip to comport with constitutional standards. The Ninth Circuit said that the jury instructions given must first be reviewed, to determine if they apprised the jury of the proper role of such damages: not to compensate plaintiff, but to punish defendant and deter defendant and others. In the matter before us, the trial court instructed the jury, in part:

> If you find that the plaintiff suffered damage as a legal result of the conduct of defendant,... you may then consider whether or not you should award punitive damages against defendant, Owens-Corning Fiberglas, for the sake of example and by way of punishment.
>
> You may, in your discretion, award such damages if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability. * * *

> The law provides no fixed standards as to the amount of such punitive damages [b]ut leaves the amount to the jury's sound discretion, exercised without passion or prejudice.
>
> In arriving at any award of punitive damages, you are to consider the following: One, the reprehensibility of the conduct of the defendant. Two, the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition. And three, that the punitive damages must bear a reasonable relation to the actual damages.
>
> The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish that defendant... was guilty of oppression, fraud or malice, entitling the plaintiff to punitive damages.

Ph. II, Tr. 1119-1121.

The court had previously instructed the jury that, as to compensatory damages:

> The total amount of plaintiffs damages is the amount that will reasonably compensate him for each of the following elements of claimed loss or harm[.]

Ph. 1, Tr. 1369.

In reviewing the instructions as a whole we find that they were adequate. The punitive damages instruction implicitly informed the jury that such damages were not to compensate the plaintiff and the instructions on

compensatory damages made that point explicitly. While it is a close question (and while reiteration of the non-compensatory nature of punitive damages would have been welcome during the instruction regarding punitive damages), it was not necessary in light of the instruction on compensatory damages.

The second stage of review requires that the trial court review the punitive damages award and record its reasons for upholding or altering it. Morgan II, 997 F.2d at 1257. Here, as in TXO, the trial court did not specifically articulate its reasons for upholding the punitive damages award but, rather, reviewed a challenge to the sufficiency of the instructions and determined in a thorough, ten-page order that they were constitutionally adequate. Because the court gave counsel an adequate hearing on its post-verdict motions, we follow the lead of the Supreme Court in TXO: we recognize (and emphasize) the desirability of the trial court's recording its reasons for altering or upholding the punitive damages award on the record but we are not prepared to consider the failure to do so a constitutional violation. TXO, 61 U.S.L.W. at 4772. We do encourage the Guam courts to more fully develop their own criteria for use by all judges when reviewing punitive damages awards, and to make a complete record.

At the third stage of review, this court is to conduct two enquiries [sic]. First, we must satisfy ourselves that defendant received the first two stages of scrutiny, which we have done. Our second task is a substantive review of the amount of the award to ensure that it "does not exceed an amount that will accomplish society's goals of punishment and deterrence." Haslip,

111 S.Ct at 1045. That is, the award must be reasonable and rational in light of its twin purposes of punishment and deterrence. Because we have above determined that "fair procedures were followed," we accord the judgment that was a product of that process "a strong presumption of validity." TXO, 61 U.S.L.W. at 4769. Here, as in TXO, the members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, and their award was reviewed and upheld by the trial judge who also heard the testimony. TXO, 61 U.S.L.W. at 4769. The award here, though large, does not "jar one's constitutional sensibilities." Haslip, 499 U.S. at 18. It presumably reflects the jury's and the trial court's assessment of the harm to appellee, the bad faith of appellant, a larger pattern of concealment by appellant of the dangers of its product, and appellant's wealth.[10] TXO, 61 U.S.L.W. at 4771.

Conclusion

Having found no error below sufficient to warrant reversal or remand, we AFFIRM.

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[10] We recognize, as did the Court in TXO, that the emphasis during argument on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident. However, the financial position of the defendant is one factor than can be taken into account when assessing punitive damages. TXO, 61 U.S.L.W. at 4771.

/s/
ALEX R. MUNSON
District Judge

/s/
EDWARD RAFEEDIE
District Judge

/s/
JOHN S. UNPINGCO
District Judge

APPENDIX C

IN THE SUPERIOR COURT
OF GUAM
TERRITORY OF GUAM
[Filed November 4, 1992]

In Re:	CIVIL CASE NO. CV0986-86
Guam Asbestos Litigation	
Plaintiff,	
vs.	DECISION and ORDER
Patrick J. Brennan	
Defendant.	

This matter came before the court upon plaintiff's and defendant's post trial motions. Appearing before the court were Mr. Thomas for the plaintiff; Mr. Playdon, Mr. Kerley, Mr. Simms, Mr. Plum, Mr. Civille for defendant Owens-Corning Fiberglass (OCF); Mr. Machado for defendant Foster Wheeler; Mr. Berger for defendants Owens-Illinois (OI) and Keene; Mr. Arriola and Mr. Kiterddahl for defendant Pittsburgh Corning Corporation (PCC); and Ms. Rice for defendant Fibreboard Corporation. Judge Peter C. Siguenza presided over the motions and took under advisement the punitive damage issue in defendant's Motion for a New Trial. The other motions were decided from the bench in favor of the plaintiff. The

Court, after hearing and considering the arguments presented, now renders its decision and denies the Motion for New Trial, or in the alternative, for remittitur as to the issue of punitive damages as well.

BACKGROUND

The plaintiff, Patrick J. Brennan, was diagnosed as suffering from malignant mesothelioma and asbestosis, both asbestos related diseases. As the testimony indicated, Mr. Brennan contracted his illness due to exposure to asbestos containing products during his years of employment.

In June of 1991, pursuant to Mr. Brennan's cause of action, the jury found the named defendants liable for the plaintiff's injury, holding the products of the defendants to be a substantial factor in causing or contributing to his deteriorating condition. In phase I of the bifurcated trial the jury awarded Mr. Bennan [sic] $2,500,000 in compensatory damages. In phase II of the trial, the jury was presented with the issue of punitive damages against OCF, and again the jury returned a verdict in the plaintiff's favor awarding Mr. Brennan $4,125,000 in punitive damages.

At the conclusion of the trial, Defendant Owens-Corning Fiberglass (OCF) filed a motion for a judgment notwithstanding the verdict, or in the alternative for a new trial, or an order for remittitur in lieu of a new trial. The motion was based on various grounds but of particular importance to the court is the challenge to the punitive damages award. OCF contends that a) the award is unconstitutional on a statutory and procedural basis, b) the award is excessive, and c) the award is not supported by the evidence.

The Court, after evaluating and considering the arguments for and against the motion, denies the motion for new trial or for remittitur in lieu of a new trial.

DISCUSSION

A) The Constitutional Challenge

OCF's main objection to the punitive damages award is that the punitive damages system implemented in Guam is unconstitutional as violative of the Due Process clause of United States Constitution.

The basis for the defense's assertion is primarily grounded in the recent Supreme Court decision in Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991). There, the high court denied a Due Process challenge to the Alabama punitive damages system, ruling that the jury instructions and post trial review procedures provided "sufficiently definite and meaningful constraints on the discretion of Alabama fact finders in awarding punitive damages" (Pacific Mutual 111 S.Ct. 1032 at 1045).

OCF argues that because Guam has not adopted the standards utilized in Alabama, or ones closely resembling them, its punitive damages system is violative of Due Process of the Fourteenth Amendment. For the reasons stated below, this Court disagrees.

OCF maintains that the Guam Superior Court should follow the standards (see Pacific Mutual 111 S.Ct. 1032, 1044-45) utilized by the Alabama Supreme Court in its appellate review of punitive damages awards. However, OCF's assertion is based on an assumption that the U.S. Supreme Court has specifically mandated and adopted the Alabama standards as the black letter law and the benchmark by which all others will be measured. Nothing in the opinion in Pacific

Mutual stands for such a position. The Court merely upheld the Alabama system against a Constitutional Due Process challenge. Though they may be considerations in assessing the constitutionality of other punitive damages systems, Alabama's procedures are in no way the set standards.

In fact, a recent 9th Circuit decision, Morgan v. Woessner F.2d, 1992 WL 220237 (9th Cir. Cal.), directly addressed this issue. In that case, the defense, in challenging a punitive damages award, argued that after Pacific Mutual, federal courts must review punitive damages with greater scrutiny. Declining to adopt the Alabama procedures, the Ninth Circuit in Morgan commented:

> In the abscence [sic] of a clear mandate from the Supreme Court, we decline to devise a new standard of review for punitive damages awards. First, we note that in cases decided after Haslip (Pacific Mutual), our circuit has not articulated a new standard. (See Larez v. City of Los Angeles, 946 F.2d 630, 639 (9th Cir. 1991). In Larez 9th Circuit reviewed punitive damages under the standard that assesses whether the awards were "grossly excessive, monstrous, or shocking to the conscience.") More importantly, we think that the standards explicitly articulated in Smith v. Wade and Browning-Ferris remain the appropriate standards for reviewing the trial courts decision not to grant a new trial and that deference to

trial courts remains appropriate. (Morgan 1992 WL 220237 (9th Cir. Cal.) at 26)

The standards of Smith v. Wade, (461 U.S. 30) and Browning-Ferris Industries v. Kelco Disposal Inc. (109) S.Ct. 2909) which the 9th Circuit refers to in Morgan basically state that a District Court's role in reviewing punitive damages award is to determine whether the jury's verdict is within the confines set by state law and to determine whether a new trial or remmittitur [sic] should be ordered. The Supreme Court also cautioned the Court should accord considerable deference to a district court's decision not to order a new trial (see Browning-Ferris 109 S.Ct. 2909, 2922)

Thus, it is quite clear that the 9th Circuit felt in no way compelled to adopt the Alabama punitive damages criteria. Its holding in Morgan evidence the recognition that each punitive award system should be assessed according to its individual merit rather than in comparison to an unsanctioned standard. In light of the above reasons, this Court too is not inclined to adopt the Alabama procedures.

B) The issue then becomes whether Guam's punitive damage procedure, standing on its own, adequately accords protection to individuals under the requirements of Due Process. Such a consideration at the trial level requires a focus on and an assessment of the jury instructions offered in court. Again, the main concern of the court in presenting its instructions is to ensure that the punitive award is reasonable in amount and rational in view of its purpose of retribution and deterrence, rather than the product of unbridled jury discretion (see Pacific Mutual 111 S.Ct. 1032, 1046)

In order to make this determination, the Supreme Court in Pacific Mutual "carefully reviewed the instructions to the jury" (111 S.Ct. 1032, 1044). The factors which the court concerns itself with are 1) whether the instructions revealed to the jury the nature and purpose of punitive damages, 2) the limits and constraints placed upon jury discretion and 3) the standard of proof upon which a punitive award is based.

1) In ruling that the jury instructions satisfied the requirements of Due Process in Pacific Mutual, the Court held "the insturctions [sic] thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." (111 S.Ct. 1032, 1044) The court in the present case initially instructed the jury that after the defendant is found liable for plaintiff's injury, the jury "may" consider whether or not it would award punitive damages against defendant OCF "for the sake of example and by way of punishment" (Civil Case No. 0986-86. Tape No. 91-1067). The purpose of punitive damages has long been recognized as punishment and deterrence. In the above instruction, the jury is enlightened as to the punishent [sic] aspect of the award, both in purpose and identification, and that its imposition is not compulsory (evidenced by the language the jury "may consider whether or not it would award"). As to the awards purpose as deterrence, the court instructed the jury that it must consider "the amount of punitive damages that will have a deterrent effect on the defendant in light of its financial condition." (Civil Case No. 0986-86 Tape

No. 91-1067). In view of the above, it is quite evident that the factors the Court concerned itself in reviewing the jury instructions as to its nature and purpose in Pacific Mutual are clearly provided for in the instructins [sic] offered to the jury in the instant case.

2) Perhaps the most important element in assessing the adequacy of protection of the defendants's Due Process rights is a consideration of the limits and constraints placed upon jury discretion in awarding damages. It is in this area of concern that the instructions given in the present case far surpass those in Alabama.

The Court in the instant case, instructed the jury that in awarding punitive damages it is to consider "one, the reprehensibility of the conduct of the defendant; two, the amount of punitive damages that will have a deterrent effect on the defendant in light of the defendant's financial condition; and three, that the punitive damages must bear a reasonable relation to the actual damages." (Civil Case No. 0986-86, Tape No. 91-1067). In Pacific Mutual, the Alabama court merely instructed the jury to consider "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong" (111 S.Ct. 1032,1037, ftn 1).

As the comparison indicates, the jury instructions in the instant case provide superior protection for the defendant's interests in two respects. First, unlike the instructions given in Pacific Mutual, the jury, at the outset, was told to consider the defendant's financial condition in assessing an award amount that would deter the future conduct at issue. This cautions the jury to render a judgment that will not in effect siphon all capital from the defendant so as to leave it non-

functional in its financial capacity. A verdict reached with this consideration in mind is clearly more just and fair to both parties to the cause of action. Second, the jury in the instant case was reminded that punitive damages must bear "a reasonable relation" to actual damages. This instruction in effect prevents the jury from running wild in awarding damages. Rather, the jury is constrained to consider what is reasonable as punishment in light of the actual harm suffered. It is quite evident that taken as a whole these factors impose more "definite and meaningful constraints" on jury discretion than those instructions offered in Pacific Mutual. For that reason, this court concludes that the defendant OCF received full protection of its Due Process rights.

3) Finally, the burden of proof for punitive damages implemented in the present case is yet another indicator of the courts effort to ensure the protection of the defendant's rights. In this case, the court adopted the strict California standard whereby punitive damages must be proved not by a mere preponderance of the evidence but by clear and convincing evidence.

In Pacific Mutual, the Alabama court instructed the jury that it may award punitive damages if it was "reasonably satisfied from the evidence" that such an award was warranted (111 S.Ct. 1032, 1037, ftn I). The Court held that this standard of proof coupled with the Alabama review procedures was all that was required to satisfy the Due Process clause (Pacific Mutual 111 S.Ct. 1032, 1046, ftn II). For the reasons below, it is clear that the higher clear and convincing standard of proof adopted by this court meets the demands required by the Due Process clause.

The clear and convincing standard imposed in this case provides assurance against unbridled and unchecked jury discretion. Here, the jury rather than being passively "satisfied" with the evidence, must carefully scrutinize the facts with precision and caution in determining whether a punitive damage award is warranted in this case. The defendant, in effect, receives greater protection of its interests as the jury carefully weighs the evidence presented on both sides. Consequently, the net effect is to diminish the probability of excessive and unsupported jury awards and at the same time increase their reliability. In all, the Due Process rights of OCF here are clearly protected and secured under the clear and convincing standard.

CONCLUSION

Commenting on the jury's role in awarding punitive damages, the Supreme Court of the United States stated "As long as the discretion is exercised within reasonable constraints, due process is satisfied" (Pacific Mutual 111 S.Ct. 1032, 1044). Though the Court did not specifically define the term, it stated in upholding the Alabama punitive award system, that the procedures provided "sufficiently definite and meaningful constraints on the discretion of Alabama fact finders in awarding punitive damages" (Pacific Mutual 111 S.Ct. 1032,1045). It is very clear that the procedure utilized in this case placed "definite and meaningful" constraints on the jury. The instructions given apprised the jury of the nature and purpose of an award of punitive damages. In addition, the factors required of the jury's consideration coupled with the clear and convincing burden of proof clearly assured the protection of the defendants Due Process rights as

the jury was required to account for the interest of the defendant and carefully scrutinize the evidence before it. These checks and constraints placed on the jury should definitely be categorized as "sufficiently definite and meaningful" and thus reasonable. Consequently, this court concludes that the punitive award procedures utilized in this case provided sufficient protection of the defendants interest and since the jury's discretion was exercised within reasonable constraints, due process is satisfied.

Motions Denied.

SO ORDERED this Nov. 4, 1992 day of October, 1992 [sic].

/s/
PETER C. SIGUENZA, JR., Judge
Superior Court of Guam

APPENDIX D

Not for Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed August 24, 1995]

**********	*	
In Re: **GUAM ASBESTOS LITIGATION**	*	
**********	*	
PATRICK J. BRENNAN,	*	No. 93-17163
Plaintiff-Appellee	*	D.C. No. CV-92-00064-ARM
v.	*	
OWENS-CORNING FIBERGLAS CORPORATION,	*	**ORDER**
**********	*	
Defendant-Appellant.	*	

Before: **PREGERSON, KOZINSKI** and **HAWKINS**, Circuit Judges

Judges Pregerson and Hawkins vote to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski votes to grant the petition for rehearing and accept the suggestion for rehearing en banc. The petition for rehearing is

DENIED. The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore **REJECTED**. Fed. R. App. P. 35(b).

Supreme Court, U.S.
FILED
DEC 18 1995
CLERK

No. 95-800

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

vs.

PATRICK J. BRENNAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the amount of the first award of punitive damages in Guam asbestos litigation reasonable:

(a) in light of the defendant's egregious death-dealing conduct through which, knowing full well the dangers of asbestos, the defendant advertised its product as safe and "non-toxic," continued to manufacture and supply a hazardous product, and refused to provide warning labels in order to protect its profit margins;

(b) when at the time of trial the defendant had yet to pay a single punitive damages award for its reprehensible conduct; and

(c) when compared to the extraordinary billion dollar plus asset value of the defendant?

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Dunn v. HOVIC, 1 F.3d 1371 (3d Cir.),
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Ernst v. Searle, 218 Cal. 233, 22 P.2d 715 (1933) 19

Glasscock v. Armstrong Cork Co.,
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Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.),
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King v. Armstrong World Industries, Inc.,
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Washington v. Farlice,
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Other Authorities:

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-800

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

PATRICK J. BRENNAN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

This is the response of Respondent, Patrick J. Brennan, to the Petition for Writ of Certiorari submitted by Petitioner, Owens-Corning Fiberglas Corporation. Mr. Brennan's family respectfully requests that this Court deny the Petition.

OPINIONS BELOW

The opinion of the United States District Court, sitting as the Court of Appeal for the Territory of Guam, was not published. The opinion of the Ninth Circuit Court of Appeals was not published. Both opinions are reproduced in the Appendix submitted with the Petition of Owens-Corning Fiberglas Corporation [hereinafter OCF].

JURISDICTION

Respondent adopts the Statement of Jurisdiction in the Petitions with this exception: The issue of whether the punitive damage awards violated due process because OCF was subjected to prior awards of punitive damages for the same course of conduct was not presented to the trial court. Since the issue was not preserved for appellate review, neither the Appellate Division of the District Court nor the Court of Appeals passed on the question. That issue, therefore, is not properly presented to this Court. S. Ct. R. 10(c), 14(g).

STATEMENT

I. The Facts: This is the *first* punitive damages case in asbestos litigation in Guam.

Patrick J. Brennan was diagnosed as suffering from malignant mesothelioma and asbestosis, both asbestos-caused diseases. He contracted his illness due to exposure to asbestos-containing products of OCF and others during his years of employment. (A.31a.) Most of Brennan's

exposure came after 1953, and OCF's Kaylo was the product he used most of the time.[1] (A.20a-21a.)

Kaylo was an insulation product with an asbestos content ranging from eleven to twenty-one percent. (Record [hereinafter R.] 209-13, 562-63.) Owens-Illinois originally developed Kaylo. Pursuant to agreement, OCF began to distribute Kaylo in 1953, and in 1958 bought the Kaylo business from Owens-Illinois. OCF manufactured and sold asbestos-containing Kaylo until 1973. It also re-branded and sold other manufacturers' products as Kaylo. (R.222, 768-78.)

Although OCF knew that asbestos dust was "a first class disaster" in the making, it persisted in advertising Kaylo as "nontoxic." (Supp. R.23, 28; R.248.) OCF did not place warning labels on Kaylo because labels meant OCF "would have had a little harder selling job," and Kaylo's profitability would have been diminished. (R.426-27.) In 1972, OCF was still trying to avoid complete disclosure on labels. (Brennan Ex. 64 ("Why say 'always' [use a respirator] if not required in national standard?").)

OCF claims it complied with government and industry standards set by the "American Conference of Governmental Industrial Hygienists." (Pet. 4.) The Conference was not a government agency. It was simply a voluntary group of interested persons who met periodically to make recommendations concerning industrial hygiene. *See, Borel v. Fibreboard Paper Products Corp.*,

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[1]Mr. Brennan died from the mesothelioma shortly after trial. He was 60 years old.

493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). At trial, OCF was totally unable to articulate any federal government safety standard which applied to Kaylo, or any state regulation in any state where OCF distributed the products to which Brennan was exposed, and could not show it met any standard whatsoever, public or private.[2] (R.687-88, 690 (OSHA did not exist when Brennan was exposed to Kaylo).

OCF did *not* comply with the voluntary guidelines set by the Conference, either. OCF implies it tested Kaylo in the 1960s and the dust generated by its tests showed Kaylo could be used without exceeding levels then thought to be safe by some in government and industry. (OCF Pet. 3, 4.) But, at trial, the evidence established that OCF conducted no tests whatsoever to measure levels of asbestos dust to which users were being exposed.[3] (R.30; Brennan

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[2]OCF argues a one-sided view of the facts -- its view. We remind OCF that Guam rules of appellate procedure require that facts asserted in briefs be "supported with appropriate references to the record." Guam R. App. P. 14(a). Arguments in briefs are to be supported by "citations to the authorities, statutes and *parts of the record relied on*." *Id.* (emphasis added); *compare*, Cal. R. Ct. 13 ("The statement [of material facts] shall be accurate and confined to matters in the record on appeal."). The same rule applies in this Court. S. Ct. R. 14(g).

Also, OCF appears to have forgotten that reviewing courts examine the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of that party. *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987).

[3]OCF claimed in its brief to the Appellate Division that the Conference set in 1946 a threshold limit value (TLV) of five million

(continued...)

Ex. 78 (OCF Memo 7/31/62 ("We currently have no specifications or test method for dustiness.").)

II. Trial Court Proceedings: The bifurcated trial commenced in June of 1991. In Phase I, the jury found Mr. Brennan had asbestos-related mesothelioma and asbestosis, his diseases were caused by exposure to the products of OCF and others, and his damages were $2.5 million. (C.R. 1902.) In Phase 2, the trial court gave the full panoply of California jury instructions on product

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[3](...continued)
particles of asbestos-laden dust per cubic foot (MPPCF) of air, and that it complied with the TLV. Putting aside the fact that the Conference lacked any force of law, OCF did not comply with it. Five million particles per cubic foot are totally invisible. The unaided eye cannot discern Kaylo dust until the particle count climbs to 800 million particles per cubic foot. Brennan and his co-workers described the dust generated by Kaylo as akin to a blizzard or a snowstorm. (Supp. R.116.) This hardly shows full compliance with a TLV of five MPPCF.

Although OCF did not test Kaylo, tests conducted by outsiders, with results communicated to OCF, revealed dust levels far above the then suggested TLV of five MPPCF. (Brennan Ex. 33 (dust sample at 91.8 MPPCF); R.956, 1006 (Kaylo dust counts exceeded 20 MPPCF).)

OCF requested an instruction telling the jury that "[c]ompliance with government safety standards constitutes strong and substantial evidence that a product is not defective." (C.R. 1971, Instr. No. 3.) There being no evidence to support the instruction, the trial court correctly refused to give it. (R.690.) Moreover, since the requested instruction did not encompass industry standards, OCF has waived any right to raise compliance with industry standards in reviewing courts. *Harmsen v. Smith*, 692 F.2d 932, 939 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983).

liability and punitive damages.[4] (R.1120.) The unanimous jury found that OCF manufactured a defective product, that Mr. Brennan's diseases were reasonably foreseeable by OCF, and OCF acted in deliberate disregard of Mr. Brennan's rights. The jury awarded punitive damages against OCF of $4.125 million. (C.R.1979.)

OCF filed a motion for a new trial, challenging, *inter alia*, the punitive damages award. On November 4, 1992, the trial court denied the motion, concluding OCF received due process because the jury (1) was properly instructed, (2) and exercised its discretion to impose punitive damages with reasonable restraint. (A.35a-39a.) OCF claims here that the trial court did not address OCF's contention that the award was excessive. However, the trial court did find the award was not excessive since it ruled there was no due process violation in that the "checks and constraints" placed on the jury were "sufficiently definite and meaningful" and thus reasonable.[5] (A.39a.)

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[4]California cases are not binding in construing Guam law, but are persuasive. *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975). The trial court expressly stated it would use California jury instructions and California law in this case. The reviewing courts also used California law. (A.8a n.2.)

[5]OCF faults the trial court for relying primarily on this Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). (Pet. at 5.) When the court ruled, this Court had not yet decided *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), or *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993.) Since *Haslip* was the Court's most recent decision on the issue, the trial court appropriately relied upon it in concluding the award of punitive damages satisfied due process.

III. The Appeals: In its appeal to the Appellate Division for the Territory of Guam, OCF argued that the amount of damages awarded was excessive, particularly since OCF already had incurred liability for numerous compensatory and punitive awards. (App. Div. Br. 33, 54-55.) Yet, OCF presented no evidence at trial that a jury had already imposed punitive damages on it, the damages had been paid, and the sum was sufficient to punish and deter.

In reviewing the size of the award, the District Court held the jury was correctly instructed, the trial court gave OCF a constitutionally adequate posttrial review, and the award was reasonable and rational in light of the twin purposes of punishment and deterrence. The award

> presumably reflects the jury's and the trial court's assessment of the harm to appellee, the bad faith of appellant, a larger pattern of concealment by appellant of the dangers of its product, and appellant's wealth.

(A.28a.) OCF appealed to the Ninth Circuit, once more complaining that the award was excessive and that the lower courts failed to afford OCF its due process rights by allegedly failing to review the size of the award. Once again OCF complained that appellate review must take into consideration prior awards, and those which may be granted in the future. (OCF Ninth Cir. Br. 23.) Nonetheless, OCF did not -- could not -- point to *any* evidence that at the time of trial it had paid *any* punitive damages or introduced any evidence with respect to the issue of actual past or speculative future awards.

The Ninth Circuit also held that trial conducted the review of punitive damages necessary to satisfy the requirements of due process.[6] (A.2a.)

REASONS FOR DENYING THE WRIT

OCF contends that it was denied independent review of the size of the punitive damage award in the trial court, in the Appellate Division, and in the Court of Appeals. OCF also contends the size of the award is grossly excessive because OCF followed government and industry standards and because of past awards of punitive damages and the potential for future damages rising out of the same course of conduct.

As we have explained above, there were no federal government standards in force during the time when Mr. Brennan was exposed to Kaylo, no state standards in States and Territories where OCF distributed the Kaylo to which Mr. Brennan was exposed, and OCF did not present evidence that it complied with voluntary industry standards. The point has been waived.

OCF has also waived any right to complain to this Court about successive punitive damage awards because it did not present any evidence in the trial court of prior punitive damages awards imposed and paid, or of the reasonable certainty of future awards. As a consequence,

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[6]OCF notes that Circuit Judge Kozinski dissented. However, Judge Kozinski's dissent involved procedural issues related to liability. He expressed no dissenting opinion as to the propriety of the size of the punitive damage award. (A.2a.)

the issue was not preserved for review in the District Court, and could not properly be presented for review to the Circuit Court of Appeals. Therefore, neither court decided an important federal question, and review in this Court is inappropriate. S. Ct. R. 10(b), (c), 14(g).

Asbestos companies have already sought and been denied certiorari on the same issues raised here.[7] The petition in the instant case should also be denied. This -- the first award of punitive damages in asbestos litigation in the Territory of Guam -- is not in need of the Court's attention.

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[7] *See, e.g., Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683, *cert. denied*, 113 S. Ct. 2335 (1993); *Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill. App. 3d 425, 599 N.E.2d 129, *cert. denied*, 113 S. Ct. 2335 (1993); *Owens-Corning Fiberglas Corp. v. Adams* (W.Va. 1990), *cert. denied*, 113 S. Ct. 3035 (1993); *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

I. THE COURTS DID REVIEW THE SIZE OF THE PUNITIVE DAMAGE AWARD

OCF contends it did not obtain any review of the size of the awards in any of the three courts which reviewed the matter. As we show, OCF is mistaken.

A. The Trial Court Provided Posttrial Review in Conformance with Haslip

The crux of OCF's first complaint is that the trial court did not articulate reasons for upholding the punitive damage award and, in any event, based its ruling on assumptions. (Pet. 7-8.)

First, this Court has never held that the trial judge must reduce to writing his reasons for upholding a punitive damages award. In *TXO*, the trial court did not specifically articulate its reasons for upholding the punitive damages award. Rather, the trial court reviewed the challenge to the sufficiency of the instructions and determined in a thorough, ten-page order that they were constitutionally adequate. Even though it would be *helpful* for trial judges to explain their rulings, a court's failure to do so is not required by the Due Process Clause or California law. TXO, 113 S.Ct. at 2724; *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1258 n.8, 1 Cal. Rptr. 2d 301 (1991). In the instant case, as in *TXO*, the trial court issued a thorough ten-page order upholding the constitutionality of the punitive damages award. (C.R.2249.) Further, inasmuch as *TXO* had not been decided when the trial judge ruled, he should not be faulted for not being more explicit in his order.

Second, we do not have the benefit of the trial court's comments during argument on the posttrial motions because OCF did not order the transcript. In every jurisdiction it is the appellant's obligation to provide an adequate record. Fed. R. App. P. 11(a); *Dienes v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992 (lack of transcript fatal to appellant's appeal); *Ballard v. Uribe*, 41 Cal. 3d 564, 567, 574-75, 224 Cal. Rptr. 664 (1986) (alleged errors not cognizable since appellant failed to provide adequate record). OCF has waived any right to complain about an alleged deficiency in the record.

Third, "a punitive damage award is excessive if it is disproportionate to the defendant's ability to pay." *Adams v. Murakami*, 54 Cal. 3d 105, 112, 284 Cal. Rptr. 318 (1991). A fair reading of the trial court's ruling indicates it did consider whether the award was excessive. The court realized that OCF made the claim. (A.31a.) The court knew its posttrial role was to make sure the award was "*reasonable* in amount and *rational* in view of its purpose of retribution and deterrence, rather than the product of unbridled jury discretion." (A.34a (emphasis in original).) The court recognized the instructions made sure the amount imposed would "not in effect siphon all capital from the defendant so as to leave it nonfunctional in its financial capacity." (A.36a-37a.)

Lastly, the court concluded that because the jury exercised reasonable restraint in imposing punitive damages, due process was satisfied. (A.38a-39a.) The trial court's conclusion surely negates OCF's claim (Pet. 8) that it did not obtain adequate review, and may have been the victim of a "a lawless, biased, or arbitrary verdict." *Honda Motor Co. v. Oberg*, 114 S. Ct. at 2341. Of

course, when it ruled, the trial court did not have the benefit of this Court's reasoning in *Honda*. Nonetheless, it would seem unassailable that the court's order expressly reflects its awareness of its duty and implicitly reveals performance of that duty -- its conclusion that the amount of punitive damages was constrained and reasonable.

OCF is a multi-billion dollar international conglomerate. (Brennan Ex. 69, 70.) There was no evidence presented to the trial court that the damages imposed were disproportionate to OCF's ability to pay or constitutionally intolerable because of prior payments of punitive damages. Consequently, the trial court's implied conclusion that the amount of punitive damages was reasonable and did not exceed constitutional limits was absolutely correct.

B. The Appellate Division Provided Appellate Review in Conformity with Haslip and TXO

OCF contends the Appellate Division "failed to conduct any review of the size of the punitive award." (Pet. 6, 9 n.2.) This is not accurate.[8]

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[8]In a footnote OCF decries the Appellate Division's reluctance to impose a rigid set of review standards on the Guam courts. OCF suggests the court was remiss in not doing so because the court abdicated its duty to enforce the Due Process Clause. (Pet. 8 n.2.) The Appellate Division was keenly aware of its obligations to scrutinize punitive damages under the Due Process Clause. (A.22a n.8.)

This Court has refused to impose upon the states a "bright-line" test to determine whether a common law award of punitive damages violates due process so long as there is sufficient judicial review of the reasonableness of the award. *TXO*, 113 S.Ct. at 2720; *Haslip*, 499

(continued...)

OCF argued in the Appellate Division that the punitive damages award violated due process because the jury was not adequately instructed and because the trial court did not conduct a meaningful post-verdict review of the award for reasonableness. The Appellate Division disagreed. (A.22a-23a.) The reasonableness of a punitive damages award is evaluated in light of the potential harm defendant's action could cause, the maliciousness of its actions, and the penalty necessary to discourage the defendant from acting similarly in the future. (A.23a-24a.)

The Appellate Division was acutely aware that it was to review the size of the award in terms of its reasonableness. (A.25a.) The court noted that under *Haslip*, it had a twofold duty. *Haslip*, 499 U.S. at 20-21. The first step was to make sure the jury instructions were adequate and the requisite posttrial review took place in the trial court; the second was evaluate the size of the award. (A.27a.) The Appellate Division satisfied itself that the jury instructions were correct and the trial court granted adequate posttrial review. (A.25a-27a.)

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[9](...continued)
U.S. at 18. The Court's posture is consistent with the *Erie* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 65 (1938) (there is no general federal common law; it is not the federal court's role to effect changes in state law); *Dunn v. HOVIC*, 1 F.3d at 1387 (regulations governing punitive damages in Virgin Islands "best left to the United States Congress or the legislature of the Virgin Islands").

The court turned to its second task, the assessment of the reasonableness of the size of the award. The court concluded that the award, though large, did not "jar one's constitutional sensibilities." (A.28a.) It reflected the twin purposes of punishment and deterrence, the harm to Mr. Brennan, OCF's bad faith, its pattern of concealment of the dangers of its product, and the appellant's wealth.

Contrary to OCF's contention in this Court, the Appellate Division afforded OCF the review to which it was entitled in accord with the Court's mandate in *Haslip*.

C. The Ninth Circuit Provided Yet One More Level of Review

OCF faults the Ninth Circuit for allegedly not undertaking the review it claims was neglected by the trial court and the Appellate Division. OCF contends that the Court's decision in *Honda* requires reversal of the punitive damages award. (Pet. 9-10.) OCF is wrong on both points.

As we have explained above, before this matter arrived in the Ninth Circuit, OCF had already had two distinct levels of review of the size of the award. The Ninth Circuit's disposition of the matter is fully consistent with *Honda*.

In *Honda*, under Oregon law, the jury had the final say on the size of punitive damages; they were immune from appellate review. The issue in this Court was whether the due process required review of the size of the judgment at the appellate level. *Honda*, 114 S. Ct. at 2334-2335. The Court held that judicial review of the size

of punitive damage awards was required. *Id.* at 2342. Our case is not *Honda*; Guam and California are not Oregon.

California posttrial procedures meet or exceed the constitutional criteria set forth in *Haslip, TXO*, and *Honda*, 114 S. Ct. at 2338 ("Every other State in the Union [except Oregon] affords post-verdict judicial review of the amount of punitive damages award . . . ."). *See also, Adams v. Murakami*, 54 Cal.3d at 110-11; *Las Palmas Associates*, 235 Cal. App. 3d at 1257-58.

The Guam court followed California law on punitive damages, gave California jury instructions,[9] and applied the California standard of review to the award -- *twice*, first in the trial court and then the Appellate Division. Since the Guam courts followed California law on this issue, and review under California law comports with due process, including the scope of appellate review mandated by this Court in *Honda*, OCF got all of the review to which it was entitled. The Ninth Circuit added yet another level of review, correctly holding: "[T]he trial court did

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[9]California pattern instructions go beyond the Alabama instructions the Court approved in *Haslip* by explicitly directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant's financial condition in determining whether the award is sufficient to punish and deter. *Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994); *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d at 1257, ("these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in *Haslip*").

not err in affirming the punitive damages award."[10] (A.2a.)

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[10]OCF professes to find a conflict between this case and cases which hold that the Due Process Clause requires meaningful review of the size of punitive damages awards. (Pet. 10-12.) OCF also purports to find a conflict between state and federal courts on the same issue. (Pet. 16-18.) We are at a loss to understand the reasoning behind these sections of OCF's brief. All courts are bound by this Court's holdings. The reviewing courts here did not carve out any exception to *Haslip*, *TXO*, or *Honda*.

If Guam were a state, its court of appeal would provide appellate review of trial court proceedings. Primary review is in the intermediate appellate court, although the losing party might obtain either discretionary review or review as of right in the state's supreme court. In Guam, the Appellate Division sits as the Guam court of appeal, and the Ninth Circuit is its supreme court. There was extensive appellate review of the size of the award by the Guam "court of appeal." The "supreme court" also reviewed the trial court proceedings and affirmed. There is no conflict between this case and the cases cited by OCF. Since there is no conflict, and neither reviewing court decided any issue of federal law, there is nothing for this Court to review. S. Ct. R. 10(a).

II. THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION BECAUSE OCF NEVER INTRODUCED EVIDENCE IN THIS CASE OF ASSESSED AND PAID PUNITIVE DAMAGES IN PRIOR CASES

OCF complains that the amount of punitive damages imposed is grossly excessive under the same factors present in *BMW of North America v. Gore*. (Pet. 13-19.) The factors argued in *BMW* include adherence to industry standards, compliance with statutory disclosure regulations, and the effect of multiple awards arising from the same course of conduct. (Pet. 13-15.)

BMW is not our case. First, as we have explained, OCF did not prove at trial that it adhered to any industry standards. Quite the contrary. Assuming there were voluntary standards in the 1950s and 1960s when Brennan was exposed to Kaylo, OCF did not meet those standards. OCF did not conduct its own tests, and tests conducted by outsiders revealed dust counts substantially higher than recommended by some non-governmental hygienists in the industry. See discussion at 4-5 & n.3, supra. As we have also pointed out, there were no government standards regarding warning labels until OSHA promulgated regulations in 1972, just as OCF took the asbestos out of Kaylo. And, right up to the bitter end, OCF resisted the notion it should provide compete warning labels. *Id.*

Second, the issue of prior multiple awards of punitive damages is not properly before this Court because OCF elected not to raise it in the trial court. Accordingly, the issue was not preserved for review in the Appellate Division and could not properly be raised in the Ninth Circuit.

Next, under California law (followed by the Guam courts in this case), the amount of punitive damages deemed necessary to punish and deter is determined at the time of trial, in this case June and July of 1991. The defendant's claim to a substantive due process violation must be evaluated in light of the sums needed to punish and deter in 1991. We agree that sometime, somewhere, juries will have imposed exemplary damages in an aggregate sum sufficient to punish and deter, OCF will introduce competent evidence of amounts it has paid, and any further awards will violate substantive due process. That day has not yet arrived -- or at least had not arrived when the Brennan matter was tried.

A. The Defendant Did Not Preserve the Issue of Successive Punitive Damage Awards for Review by This Court

OCF has waived any error relating to the constitutionality of successive punitive damages.

Under this Court's rules, a petitioner must make specific reference to places in the record where the challenged matter appears to show that the Court has jurisdiction to review the judgment. S. Ct. R. 14(g). In addition, the Court has traditionally declined to review "a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida,* 112 S. Ct. 2114, 2119 (1992) (failure to object to jury instruction precluded review); *cf., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973) (states afforded wide latitude in developing procedural rules).

As a procedural matter, an issue not preserved in the trial court will not be considered by reviewing courts, and a theory not raised in the trial court cannot be asserted for the first time on appeal. *Ernst v. Searle*, 218 Cal. 233, 240-41, 22 P.2d 715 (1933); *North Coast Business Park v. Nielsen Const. Co.*, 17 Cal. App. 4th 22, 28-29, 21 Cal. Rptr. 2d 104 (1993). Where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer cannot later use that tactical decision as the basis to claim prejudicial error on appeal. *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686, 12 Cal. Rptr. 2d 279 (1992); *and see, Pat Rose & Assoc. v. Coombe*, 225 Cal. App. 3d 9, 23-24, 275 Cal. Rptr. 1 (1990) (failure to present evidence on an issue is waiver of claim of error on that issue on appeal).[11]

OCF may not by-pass a state court procedure by not offering evidence, then argue that the result is substantively unconstitutional. *See, Yee v. City of Escondido*, 112 S. Ct. 1522, 1528-29 (1992). Some indication of possible liability for punitive damages is made part of the Form 10-K OCF files each quarter with the SEC. (R.853-854.) OCF moved to exclude the Form 10-K from evidence (C.R. 1930) and succeeded in keeping out the pages referring to asbestos litigation and punitive damages. (R.857.)

OCF presented the trial court with no evidence whatsoever of prior awards of punitive damages made and paid. Therefore, it could not *properly* raise a due process claim with respect to successive punitive damage awards

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[11]Disapproved on other grounds in *Adams v. Murakami*, 54 Cal. 3d at 116.

because it did not preserve the issue by presenting evidence in the trial court. Instead, OCF tried to raise the issue for the first time on appeal by attaching documents to its reply brief in the Appellate Division. However, reviewing courts will not consider facts outside the record developed in the trial court. *United States v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). The Appellate Division explained the court was "confined it its deliberations to the record before it," and appropriately struck all the improper material.[12] Order (Oct. 18, 1993). Because the Appellate Division did not consider the issue in its decision, the issue was not preserved and could not properly be raised in the Ninth Circuit. *Compare, Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993).

The rule is illustrated in *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1287 (2d Cir.), cert. denied, 489 U.S. 920 (1990), where the court declined to consider the argument of one defendant that multiple imposition of punitive damages for the same course of conduct violated due process because the defendant did not raise the issue in the trial court.

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[12]OCF has repeatedly -- and improperly -- attempted to interject into appellate proceedings unsubstantiated claims of punitive damage awards, but never submits any documentation whatsoever to prove whether it has actually paid *any* punitive damages. For example, in this case, OCF tried to persuade the Appellate Division to consider its March 31, 1993, SEC filing reflecting the alleged fact that as of March 31, 1993, OCF had "resolved" 107,800 asbestos cases. (OCF App. Div. Rep. Br. 45 & Ex. F (struck by the Appellate Division because it was outside the record on appeal)).

Since OCF by-passed state procedure by not offering evidence of prior punitive damage awards, OCF cannot point to any place in the record where the federal question was timely and properly raised. S. Ct. R. 14(g). The record is insufficient to permit examination of their due process claim. In *TXO*, the Court declined to consider an issue not properly presented to the highest state court. 113 S. Ct. at 2723-24. As in *TXO*, we ask the Court not to pass on the issue. Out of the proverbial abundance of caution, however, plaintiff will address the defendant's arguments.

B. Successive Punitive Damages Are Not Per Se Unconstitutional

OCF challenges the constitutionality of successive awards of punitive damages. (Pet. 14-15.)

Every court that has considered the question has concluded the Fourteenth Amendment does not insulate a manufacturer of a defective product from successive punitive damage awards based on the marketing of the product. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 808-09, 174 Cal. Rptr. 348 (1981); *Dunn v. HOVIC*, 1 F.2d at 1385-86; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir.), *cert. denied*, 112 S. Ct. 1778 (1991); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1031-33, *cert. denied*, 497 U.S. 1057 (1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-83 (2d Cir.), *cert. dism.*, 497 U.S. 1057 (1990).

We have no quarrel with the general principle that the amount of punitive damages paid in the past may be a

relevant factor a jury could consider in assessing punitive damages in a particular case. Nonetheless, the plaintiff maintains that in order to preserve the twin goals of deterrence and punishment, the OCF must present competent evidence at trial that it has paid prior awards, and those payments were sufficient to punish and deter.[13] (R.4122-23.) If, having heard that evidence, the jury nonetheless imposes additional damages, the trial court and

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[13]Instead, OCF brings its claims in this Court, arguing that it has been sued by hundreds of thousands of persons, has taken a charge against earnings, and as of February 1994, 38 juries had imposed $77 million in punitive damages against OCF. Of course, OCF did not introduce this "evidence" during the 1991 trial, and it has never been challenged on cross-examination. Further, OCF's claim is egregiously deceptive. The gross sum of $77 million must be adjusted for cases where the jury award has been remitted in posttrial proceedings or reduced through settlement negotiations. For example, in *Dunn v. HOVIC*, 1 F.3d 1371, a $25 million award was reduced to $1 million. OCF's gross $77 million figure undoubtedly includes the *Dunn* $25 million, the unpaid $4.125 million in this case, and the unpaid $4 million awarded in *Owens-Corning Fiberglas v. Rekdahl*, Case No. 95-818 (Pet. for Writ of Cert., filed Nov. 22, 1995). What OCF needs to prove *at trial* is that the *net* amount of punitive damages it has paid exceeds constitutionally tolerable limits.

The much-lamented "charge against earnings," never introduced at trial, is merely a bookkeeping device by which a company creates a paper reserve to provide for possible future liabilities. It does not mean that OCF must pay, has paid, or will pay, anything at all out of the reserve. The "charge against earnings" does have the attractive advantage of being a tax deduction.

OCF's repeated protestations that it has been wronged remind us of the warning, "The louder he talked of his honor, the faster we counted our spoons." Emerson, The Conduct of Life, *Worship* (1860).

the reviewing court can undertake a meaningful posttrial inquiry -- based on the evidence -- into the issues of whether past awards and payments of punitive damages were indeed sufficient to punish and deter and whether another award would violate due process.

This is the approach adopted by the Second Circuit in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277. In *Simpson*, defendant Pittsburgh Corning sought to avoid a punitive damage award based on a claim it had already paid punitive damages for the same course of conduct. *Id.* at p. 280. The reviewing court disagreed. Assuming that a civil litigant has a due process right to protection from repetitive punitive damage assessments, the defendant could make such a showing in one of two ways. In the "single punitive award" approach, the defendant could show it had previously been punished for the full extent of its wrongful conduct, not merely that it had been *assessed* a sum appropriate to punish it for injuries to particular plaintiffs. Or, under the "aggregate punitive award" approach, the defendant could show that the sum of all punitive damages awards it had paid reached the maximum tolerable under the due process clause. Since the defendant presented no proof of either alternative, the court rejected its claim. *Id.* at 280-81; *see also, Kochan v. Owens-Corning Fiberglas Corp.*, 610 N.E.2d at 694 (defendant bears burden of proof on this question); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d at 812 (if defendant is confronted with possibility of punitive award in subsequent case for the same conduct, it can raise the issue of successive awards in the next case).

Simpson, decided in 1990, surely put the asbestos manufacturers on notice that if they wished to raise a possible due process violation based on successive awards

of punitive damages, they bore the burden of establishing at trial that they had paid so much in prior awards that one more would be constitutionally intolerable. OCF elected not to do this.

Inasmuch as OCF presented no proof of either alternative explained in *Simpson*, there was nothing for any of the three courts (which have already examined the substantive due process claim) to review. There being no evidence, there is nothing for this Court to review either.

C. At the Time of Trial OCF Had Not Actually Paid Any Punitive Damages

Under California law, which Guam applied in this case, the reasonableness of the amount of punitive damages is measured against the defendant's financial condition at the time of trial. *Mariott v. Williams*, 152 Cal. 705, 710, 93 P. 875 (1908); *Washington v. Farlice*, 1 Cal. App. 4th 766, 777, 2 Cal. Rptr. 2d 607 (1991).

Someday, OCF may actually pay punitive damages. Somewhere, in some case, OCF will present to the finder-of-fact competent evidence of those payments. The day will come when the fact finder will say, "enough" -- OCF has paid sufficient punitive damages to satisfy society's goals of deterrence and retribution for its egregious course of misconduct which cost so many so much needless pain, suffering, and death. Yet another award would be constitutionally intolerable.

But in this case, as of June and July of 1991, OCF offered no evidence of prior punitive damages imposed and paid. Since punitive damages are measured by the

defendants' financial condition at the time of trial, and the properly instructed jury did just that, there is nothing for this Court to review.

III. EVEN IF THIS COURT DECIDES *BMW* FAVORABLY TO THAT DEFENDANT, THE JUDGMENT IN THIS CASE WILL NOT CHANGE

OCF professes to find great similarities between this case and *BMW of North America v. Gore*. The real issues in *BMW* bear little resemblance to the issues OCF raises in this Court. First, in *BMW*, the Alabama jury awarded punitive damages based not on the defendant's fraud against a single plaintiff, but upon the multiple frauds involved in refinished vehicles sold throughout the United States. By contrast, California jury instructions, which were given here, make it clear that the jury was punishing the defendant only for its reprehensible conduct against the individual plaintiff. (R.1121 (punitive damages must bear reasonable relation to actual damage suffered by the plaintiff).)

Second, the relationship between punitive damages in the *Brennan* case is nowhere near 500 times the amount of compensatory damages it was in *BMW*. Brennan's compensatory damages were $2.5 million. Punitive damages imposed on OCF were $4.125 million. The ratio of punitive damages to compensatory damages is less than 2 to 1.

Third, OCF's claim that it is insulated from punitive damages because its conduct matches that of BMW (i.e., OCF labeled its Kaylo and otherwise complied with industry standards) is not supported by the record or case

law. (Pet. 10.) Before 1972, OCF *never* warned that exposure to its products could cause disease. (R.426-27, 543, Supp. R.1102.) And, as we have explained, there were no controlling regulations, and OCF did not even comply with voluntary standards. See discussion at 4-5, *supra*. Even *if* there had been government or industry standards, and even *if* OCF had complied with them, it still would not be immune from punitive damages under California law. One reason punitive damages developed is *because* "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacturer and distribution of defective products." *Grimshaw*, 119 Cal. App. 3d at 810.

Finally, from what members of bench and bar could glean from the tenor of argument in *BMW*, the punitive damages issues which appeared to concern the Court in *BMW* are totally different from the issues OCF raises here.

OCF suggests that this Court should grant and hold the petition until its decision in *BMW*, and then dispose of it in light of *BMW*. If the Court does not grant certiorari, OCF suggests that the matter be remanded for further appellate review.[14] (Pet. 15, 18.) A remand in light of *BMW* on the issue of multiple awards would not affect the

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[14]From notice of appeal in Guam (11/28/92) to petition for certiorari in this Court (11/21/95), the appeals process consumed three years. OCF routinely waits until the very last day to perform every act required during the appellate process. While we recognizes the defense entitlement to invoke legal means to postpone payment of the judgment, ethically and morally it is difficult to justify deliberate and avoidable delays in the appellate processes as a means to that end.

issue. Accordingly, there is nothing for the Appellate Division or the Court of Appeals to review anew. Since there is no evidence to re-review, the Court may rest assured that if it remands the case, the result will be the same, another round of appeals will ensue and this Court can expect to see the same matter sometime in 1998 or 1999.

CONCLUSION

"Delay of justice is injustice." *People v. Hartman*, 170 Cal. App. 3d 572, 216 Cal. Rptr. 641 (1985). This case was tried four and one-half years ago. It has been on appeal for three years. The Brennan family asks this Court to deny the petition so that society's goals of punishment and deterrence finally may be satisfied, and the family at long last will have closure following the sorrowful experience of losing Patrick Brennan to a horribly painful disease.

December 15, 1995

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JAN 8 1996
CLERK

No. 95-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

PATRICK J. BRENNAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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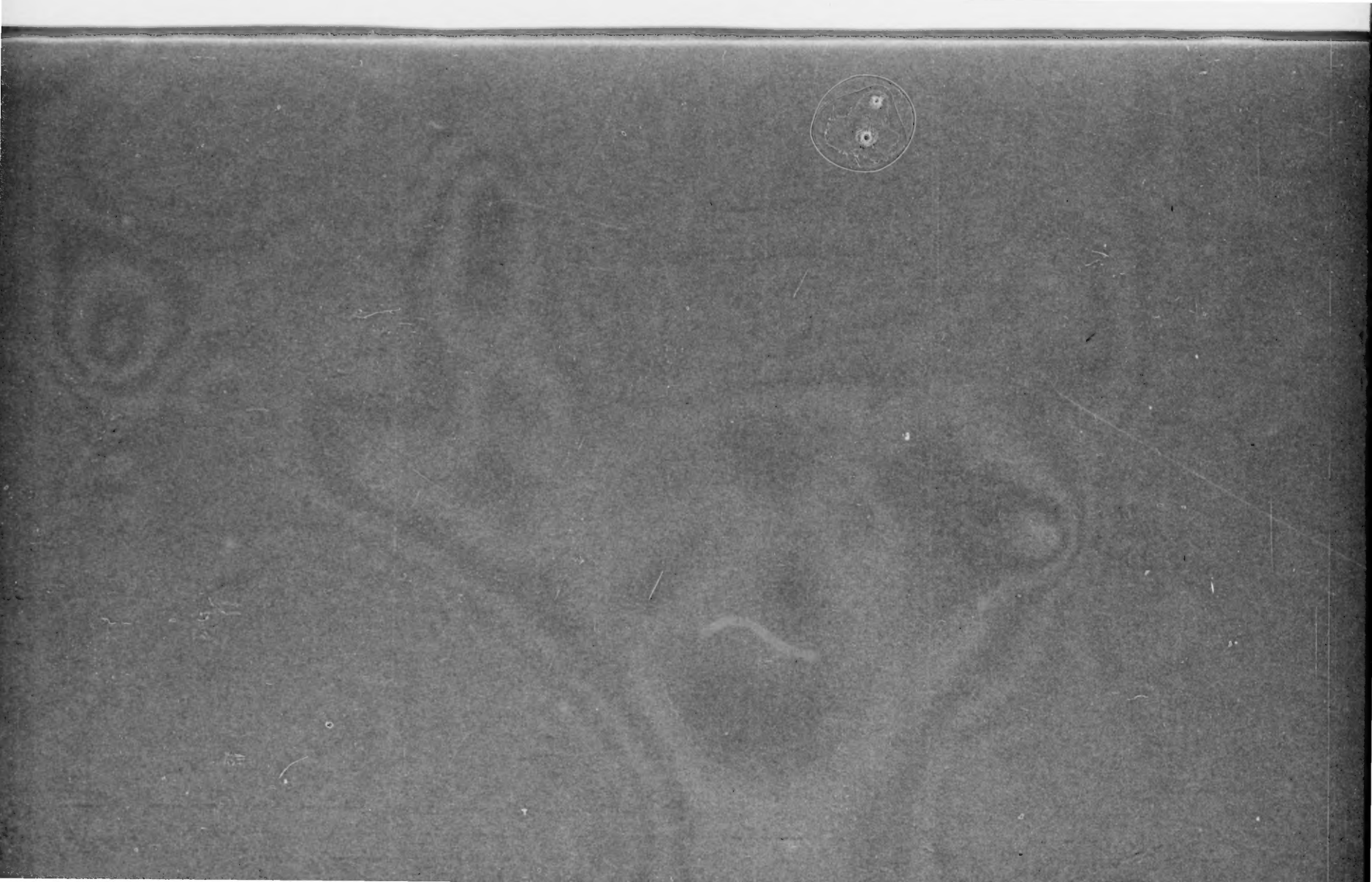

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REPLY BRIEF FOR THE PETITIONER

Owens-Corning Fiberglas Corporation ("OCF") respectfully submits this reply brief in support of its petition for a writ of certiorari.

I. Summary Reversal Is Necessary To Correct The Trial Court's Clear Refusal To Review The Size Of The Punitive Damage Award

In response to OCF's showing that the trial court did not review the size of the punitive damage award, respondent asserts (Br. in Opp. 11) that OCF waived this issue by failing to request a transcript of the oral argument of its post-trial motions. Respondent's argument is meritless, because the trial court did not rule on OCF's challenge to the punitive damage award at the time of the oral argument. Instead, the court "took under advisement the punitive damage issue in [OCF's] Motion for a New Trial." Pet. App. 30a. Thereafter, the court issued the opinion set forth in the petition appendix, stating: "The Court, after hearing and considering the arguments presented, *now* renders its decision and denies the Motion for New Trial, or in the alternative, for remittitur as to the issue of punitive damages." *Id.* at 30a-31a (emphasis added). Thus, the transcript of the oral argument would have been and is irrelevant because the trial court's complete ruling is set forth in its written opinion, not in the transcript.[1]

[1]Respondent's assertion (Br. in Opp. 10) that trial courts need not set forth in writing their reasons for upholding awards of punitive damages is wholly beside the point. The constitutional violation at issue here is the court of appeals' refusal to remedy the trial court's utter failure to conduct any judicial review of the size of the punitive damage award.

Respondent is wholly unable to refute OCF's showing (Pet. 7-10) that the trial court failed to conduct the requisite review of the size of the punitive damage award. Indeed, respondent's attempts to support his claim that the trial court made an "implied" determination of this issue serve merely to bolster OCF's position.

For example, respondent asserts that the trial court must be deemed to have conducted the requisite judicial review because it "knew its posttrial role was to make sure the award was '*reasonable* in amount and *rational* in view of its purpose . . . .'" Br. in Opp. 11 (quoting Pet. App. 34a). The words used by the trial court immediately prior to the passage quoted by respondent reveal, however, that the trial court's concern for reasonableness and rationality applied only to its jury instructions. What the trial court actually stated is this: "[T]he main concern of the court *in presenting its instructions* is to ensure that the punitive award is *reasonable* in amount and *rational* in view of its purpose . . . ." Pet. App. 34a (first emphasis added).

Obviously, that passage provides no support for respondent's assertion that the trial court conducted its own review of the size of the punitive damage award. To the contrary, that passage merely confirms what is obvious from the remainder of the trial court's opinion: the court limited itself to a review of the trial procedures and jury instructions because it believed that its constitutional obligations were satisfied and OCF's constitutional rights vindicated once it had assured itself that the jury's discretion had been subjected to appropriate constraints by the punitive damage instructions.

Respondent also errs in claiming that the trial court found no due process violation because it "concluded that . . . the jury exercised reasonable *restraint* in imposing punitive damages." Br. in Opp. 11 (citing Pet. App. 38a-39a) (emphasis added). What the trial court held instead is that

"due process [wa]s satisfied" because "the jury's discretion was exercised within reasonable *constraints*." Pet. App. 39a (emphasis added). OCF's argument is straightforward: Regardless of the alleged adequacy of the procedural "constraints" imposed on the jury, the Due Process Clause also requires judicial review of the *size* of the punitive damage award itself. The trial court's opinion makes perfectly clear that it did not conduct any such review because it operated under the misapprehension that "due process is satisfied" by adequate trial procedures alone. The court of appeals failed to correct that misapprehension, in direct contravention of this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 (1994), and summary reversal is therefore appropriate.

II. Review Is Warranted To Resolve The Conflict Among The Lower Courts Regarding Whether The Due Process Clause Requires Appellate Courts To Review The Size Of Punitive Damage Awards

Respondent makes no effort to show that the court of appeals conducted any appellate review of the size of the punitive damage award. Instead, respondent appears to argue (Br. in Opp. 14-16 & n.10) that the court of appeals' failure to comply with the dictates of the Due Process Clause and *Honda* should be excused because the Appellate Division allegedly conducted the requisite review. That argument is wholly without merit.

In the first place, as previously explained (Pet. 8 n.2, 12), the Appellate Division did not properly review the size of the punitive damage award to determine whether it was unconstitutionally excessive. Respondent quotes (Br. in Opp. 14) that court's off-hand remark that the punitive damage award "'does not jar one's constitutional sensibilities,'" but that remark was immediately followed by the explanation that the punitive damage award "*presumably* reflect[ed] the jury's and the trial court's assessment" of

various factors. Pet. App. 28a (emphasis added). Appellate review does not consist of adopting a conclusive presumption that the jury and trial court imposed an appropriate award, particularly where, as here, the trial court conducted no judicial review of the size of that award.

In any event, the nature of the review undertaken by the Appellate Division is irrelevant. OCF properly exercised its statutory right of appeal to the Ninth Circuit, and that court reviews appeals from the Guam courts without giving any deference to the intervening decisions of the Appellate Division. *See Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988) (en banc). Thus, the court of appeals had an independent obligation to conduct its own review of the size of the punitive damage award in this case.

Respondent effectively concedes that the court of appeals did not satisfy that obligation, admitting (Br. in Opp. 16 n.10) that "neither reviewing court decided any issue of federal law." In short, OCF challenged the unconstitutionally excessive nature of the punitive damage award at all levels of the judicial system (Pet. 4-6), but the court of appeals refused to conduct any appellate review of the size of that award. Review is warranted to resolve the conflict between that approach and the numerous contrary decisions cited in the petition. Pet. 11-12.

III. The Punitive Damage Award Is Grossly Excessive Under The Due Process Clause And The Factors Presented In The *BMW* Case

A. Respondent contends (Br. in Opp. 17-21) that OCF has waived its challenge to the excessiveness of the punitive damage award because it did not present the jury with evidence of prior punitive damage awards against it. That contention is without merit, for several reasons.

First, respondent misconstrues the question presented in the petition. OCF seeks review of the question whether the

punitive damage award is unconstitutionally excessive, and there is no dispute that OCF preserved that issue at all stages of this litigation. Respondent's waiver argument is, therefore, mistaken.[2]

Second, respondent errs in assuming that OCF's due process claim cannot be considered unless evidence of prior punitive damage awards was presented to the jury in a particular case. No such evidence was presented to the jury in the *BMW* case; indeed, no such evidence could have been presented, because no prior punitive damage awards had been imposed on the petitioner in that case. The factor relied upon by the petitioner in *BMW* is instead the obvious potential for multiple awards in the mass tort context (*see, e.g.*, *BMW* Pet. Br. 45-50); precisely that same factor is present in this case, as even respondent concedes (Br. in Opp. 24).[3]

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[2]It is difficult to understand the point of respondent's discussion (Br. in Opp. 18-19) of this Court's Rule 14.1(g)(i) and the adequate-and-independent state ground doctrine. Those rules have no application to this petition, which seeks review of the judgment of a federal court of appeals. To be sure, the trial court in this case was a Guam territorial court (not a state court), but this Court's jurisdiction to review the judgment below rests upon 28 U.S.C. § 1254(1), not 28 U.S.C. § 1257(a), and federal review of judgments entered in the Guam courts is plenary even as to matters of Guam law, *see Guam v. Yang*, 850 F.2d at 511.

[3]Respondent's insistence on the need for presentation of such evidence to the jury appears to rest on the assumption that courts considering claims of excessiveness are precluded from considering matters not presented to the jury. The question of excessiveness is one of law for the court, however, not a factual issue for determination by the jury. For that reason, both the California courts and the Ninth Circuit look to awards in other cases in considering whether a particular award is excessive, without regard to whether those other awards were presented to the jury at trial.

[Footnote continued on next page]

In any event, evidence of the mass-tort nature of this case and the clear potential for massive damages awards *was* properly presented to the lower courts. In support of its motion for new trial or remittitur, for example, OCF submitted to the trial court excerpts from its 1991 Form 10-K showing *inter alia* that it had taken an $800 million charge against future earnings in that year alone to reflect the estimated *uninsured* cost of future awards in asbestos cases. *See* CR 2181 (C.A. Excerpt of Record tab F). Respondent filed a motion to strike that material from the record, but the trial court denied that motion. *See* CR 2187, reproduced at App., *infra*, 1a-2a.

OCF presented similar evidence to the court of appeals, explaining the massive and increasing financial impact of asbestos litigation and identifying all punitive damages awards previously imposed on OCF in asbestos cases. *See* OCF C.A. Br. 25-27 n.27 (citing 38 other cases in which more than $73 million in punitive damage awards had been

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[Footnote continued from previous page]

See, e.g., Morgan v. Woessner, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994); *Yako v. United States*, 891 F.2d 738, 746 (9th Cir. 1989); *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987); *Shaw v. United States*, 741 F.2d 1202, 1209 (9th Cir. 1984); *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1259 n.9, 1 Cal. Rptr. 2d 301 (1991); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 393-96, 202 Cal. Rptr. 204 (1984); *see also Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 888, 213 Cal. Rptr. 547 (1985) (barring punitive damages in part based on counsel's statement "at oral argument that there are hundreds of [similar] cases pending nationwide").

imposed on OCF);[4] *id.* at 24-25 (noting that as of March 31, 1995, OCF had already settled or resolved approximately 107,800 asbestos claims and had taken an aggregate charge against earnings of $943 million to reflect the estimated uninsured costs of asbestos litigation through 1999) (citing OCF's First Quarter 1993 Form 10-Q, C.A. Excerpt of Record tab H).[5]

Respondent filed a motion to strike all references to this material from OCF's brief, asserting that it was not properly before the court of appeals. OCF filed a response to that motion, explaining that this material was the proper subject of judicial notice and was therefore appropriate for consideration by the court. *See* Response of Appellant in Opposition to Motion to Strike Portions of Appellant's Brief and Excerpt of Record and Request for Sanctions at 6-11 (citing *inter alia* Fed. R. Evid. 201; *United States ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244,

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[4]Respondent is simply wrong in asserting (Br. in Opp. 22 n.13) that this total included amounts (such as the $25 million awarded by the jury in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993)) that had been reduced on appeal at the time OCF's brief was filed in the court of appeals. To the contrary, the total set forth in OCF's brief did not include any remitted or reversed portions of the punitive damage awards at issue. Since the time that brief was filed, of course, a few of these awards have been remitted or reversed, but many additional awards have been imposed on OCF; the current total is in excess of $100 million.

[5]OCF presented similar material to the Appellate Division, but as respondent notes (Br. in Opp. 20), that court granted respondent's motion to strike that information from OCF's briefs in that court. What respondent neglects to point out, however, is that OCF presented this same material to the court of appeals, and that court did *not* grant respondent's motion to strike.

248 (9th Cir. 1992); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991); *In re Kelly*, 841 F.2d 908, 911 n.1 (9th Cir. 1988); *Railway Labor Execs. Ass'n v. ICC*, 784 F.2d 959, 968 (9th Cir. 1986)).

The court of appeals did not grant respondent's motion to strike. Thus, OCF's showing of past punitive awards and the financial impact of asbestos litigation was properly before that court when it made its decision, and those matters are part of the record in this case. Respondent's waiver argument is therefore incorrect even on its own terms.

B. Respondent also errs in attempting to deny the existence of evidence demonstrating OCF's compliance with government and industry safety standards. As OCF explained below, it "presented evidence that various tests conducted in the 1960's by Aetna, DuPont, and Union Carbide uniformly concluded that Kaylo could be manufactured, cut, and used safely without exceeding the Threshold Limit Value [TLV],"[6] which had been "recommended by the American Conference of Governmental Industrial Hygienists and adopted by various jurisdictions, including New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located)." OCF C.A. Br. 31 (citing OCF Exhs. 55, 73, 84, 136, 280, 407, 620, 621, 625; C.A. Excerpt of Record 172-84C); *see also* II Tr. 951-52, 956-57, 1058-59, 1068-69.[7]

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[6]Respondent claims (Br. in Opp. 4-5 & n.3, 17) that OCF did not conduct any of its own tests, but ignores the fact that tests conducted by outsiders showed that Kaylo could be manufactured and handled without creating average asbestos exposures in excess of the TLV. Respondent points to a study conducted by Aetna in 1958 (*see* Br. in Opp. 4-5 n.3, citing Brennan Ex. 33), but even that study (which was conducted for Owens-Illinois) showed that Kaylo dust levels were below the TLV in most work areas.

[7]Respondent asserts (Br. in Opp. 3-4 & n.3) that the ACGIH is not

[Footnote continued on next page]

Moreover, OCF began placing warning labels on Kaylo boxes in 1966, long before labeling was required by federal law. OCF C.A. Reply Br. 14 n.25 (citing II Tr. 542-43, 552-53; OCF Exhs. 416, 421). When OSHA promulgated a regulation in 1972 requiring the labeling of asbestos products, the label already being used by OCF complied fully with the regulation. OCF C.A. Br. 31 (citing OCF Exh. 270, 279).

As the foregoing discussion demonstrates, OCF introduced substantial evidence of its compliance with contemporary government and industry safety standards. Respondent's contentions to the contrary are without merit.[8]

C. As noted in the petition (Pet. 15 n.5), this Court's recent grant of a stay in a case presenting a virtually indistinguishable issue, *Owens-Corning Fiberglas Corp. v. Rek-*

[Footnote continued from previous page]

a governmental body and that the TLV was not adopted in jurisdictions where he worked. He does not deny, however, that the TLV was the generally accepted safety standard in the industry or that the TLV was adopted by law in a number of States. Accordingly, the parallel between this case and *BMW* is exact.

[8]Respondent also errs in contending (Br. in Opp. 5 n.3) that OCF waived its due process challenge to the punitive damage award by failing to request an instruction stating that compliance with industry standards is "'evidence that a product is not defective.'" The question presented in the petition does not involve the type of evidence that will support a finding of product defect. Instead, OCF is challenging the punitive damage award as unconstitutionally excessive, as demonstrated in part by the evidence of OCF's compliance with government and industry safety standards. A jury instruction about the product-defect issue would have been irrelevant to the question raised in the petition, and OCF therefore had no obligation to request one.

dahl, Nos. A-241 and 95-818, pet. for cert. filed (Nov. 22, 1995), demonstrates the propriety of holding this petition pending the Court's disposition of *BMW*. Respondent offers no basis for his contrary conclusion.[9] The fact that the ratio of punitive damages to actual damages in *BMW* is higher than it is in this case is beside the point, because this Court has already indicated that such ratios are not dispositive under the Due Process Clause. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). Instead, the Court's resolution of the excessiveness issue in *BMW* is likely to turn in large part on its analysis of many of the same factors at issue here, and thus a remand for reconsideration of the judgment below will almost certainly be appropriate if the Court resolves the excessiveness issue in favor of the petitioner in *BMW*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment below summarily reversed, and the case remanded for further proceedings. In the alternative, the petition should either be granted and set for plenary consideration or held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

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[9]Nor does respondent even attempt to refute OCF's showing (Pet. 16-17) that the judgment below conflicts with the Third Circuit's decision in *Dunn v. HOVIC*. The existence of that conflict further demonstrates the certworthiness of this petition.

January 3, 1996

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IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM
[Filed April 15, 1992]

IN RE:	)	CIVIL CASE NO. CV0986-86
	)	
GUAM ASBESTOS LITIGATION	)	
	)	
	)	
(PATRICK J. BRENNAN)	)	
	)	

ORDER DENYING MOTION TO STRIKE AND ALLOWING PLAINTIFF TO FILE RESPONSIVE MEMORANDUM

Hearing was held in chambers at approximately 2:30 p.m. on April 6, 1992, on Plaintiff Patrick Brennan's Ex Parte Motion to Strike Owens-Corning Fiberglas Corporation's ("OCF") supplemental memorandum. Duncan G. McCully of McCully, Lannen, Beggs & Melancon, P.C., appeared on behalf of Plaintiff and Frederick J. Kerley of Moore, Ching & Boertzel, appeared on behalf of OCF. After having considered the memoranda submitted by the parties in support of and in opposition to the motion to strike and having listened to the arguments of counsel for the parties,

IT IS HEREBY ORDERED that Plaintiff's motion to strike is denied and that Plaintiff's counsel will be allowed ten (10) days, up to and including April 16, 1992, within which to file and serve a memorandum in response to the supplemental memorandum of OCF filed herein on March

23, 1992 and the Excerpts of OCF's 1991 Form 10-K filed herein on March 31, 1992.

SO ORDERED this 15th day of April, 1992.

/s/

PETER C. SIGUENZA, JR., Judge
Superior Court of Guam